

Self-Determination, Minority Rights and Oppression

A Chinese Tibetan Perspective

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Abstract

The purpose of the thesis is to identify why Tibet has been unable to achieve the independence or self-determination it seeks while, at the same time, more than fifty years after the Chinese occupation of Tibet, the Tibet Question remains unresolved. In conducting an examination of the legal theory of self-determination and its limitations, in an analysis incorporating legal norms of sovereignty and territorial integrity and also human rights, further objectives are to find out how the international legal system and the legal theory on which it is premised have impacted on the relationship between China and Tibet. The thesis in addition considers the implications for international law of the failure of the international community to resolve the Tibet issue in a rapidly changing world where the principle of external self-determination is seen to be extending its reach and what has been perceived as a bar on unilateral secession is called into question. Current theories and developments with respect to self-determination are considered, against a subtext of political realism, as is the extent of human rights abuses in Tibet. I conclude the thesis with an assessment that Tibet needs to refocus its claims with reference to self-determination to take advantage of potential reconfiguration of the law resulting from developments in the proposed Kosovo Status Settlement, together also with an assessment of the pressures on international law arising not only from the long-standing and presently unresolved Tibet Question but also from the dynamism evinced in the theory of self-determination particularly with reference to the ongoing situation in Kosovo.

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List of Abbreviations

Badinter Commission	Arbitration Commission of the Conference for Peace in Yugoslavia
CCP	Chinese Communist Party
CFI	Court of First Instance
CHR	Commission on Human Rights
ECOSOC	Economic and Social Council (of the United Nations)
EJIL	European Journal of International Law
EU	European Union
FRY	Federal Republic of Yugoslavia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLT	International Committee of Lawyers for Tibet
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFDA	International Foundation for Development Alternatives, Nyon, Switzerland
ILO	International Labour Organization
KFOR	Kosovo Force (NATO-led)
LNTS	League of Nations Treaty Series
NATO	North Atlantic Treaty Organisation

NGOs	Non-governmental organisations
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCART	Preparatory Committee for the Autonomous Region of Tibet
PLA	People's Liberation Army
PRC	People's Republic of China
Seventeen-Point Agreement	Agreement on Measures for the Peaceful Liberation of Tibet 1951
TAR	Tibet Autonomous Region
TCHRD	Tibetan Centre for Human Rights and Democracy
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMISET	United Nations Mission of Support in East Timor
UNOSEK	United Nations Office of the Special Envoy for Kosovo
UNPO	Unrepresented Nations and Peoples Organization
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USSR	Union of Soviet Socialist Republics

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1 Introduction

1.1 The Background and the Issues

During the first decade of the twenty-first century the people of the world are on the move as never before. The age of mass travel has dawned, as ease of communication expands amid a burgeoning global infrastructure. All this facilitated by an ever-increasing speed of technological advance, leading to a world that would have been unrecognisable a century ago, even fifty years ago. A world, though, that has as a result a new range of problems, difficulties which themselves can be exacerbated by the very speed of change.

Road and rail construction projects enable people to travel more freely and extensively on land, and the construction of new airports together with expansion of existing airports broadens the accessibility of many parts of the world to the business traveller and to the tourist. The advent of the Internet means that information becomes accessible on an exponential basis. As greater numbers go 'on-line' and have wider access to all sorts of information, that which was unknown or secret becomes available to increasing numbers of people.

Politically and economically the world shrinks and becomes more integrated. The interests of the United Nations extend around the globe, and offshoots of that organisation, economic, humanitarian and otherwise, operate in ever more countries, a constraint on the power of the state. Similarly, supranational organisations such as the European Union impinge on established power of states; bodies such as the World Trade Organization exist to regulate trade among nations throughout the world; and

such as the North American Free Trade Agreement regulate not only trade, as evident from its title, but also seek to raise living standards within its area and to regulate, for instance, environmental conditions. The link between politics and economics is woven and evident, and globalisation continues apace.¹

Parallel to this increased integration there is a concurrent fragmentation of states. This is incipient in, for example, Canada and Australia, where indigenous peoples seek greater powers, and has become transparent in the unified Soviet Union, and also Yugoslavia, now both largely broken up into their constituent parts.² Territorial integrity is a political imperative of states, and this type of political development is anathema to the nation state, be it an ethnically homogeneous nation state or a multinational or multicultural state.

Those seeking to break up the state may attempt to do so by peaceful or violent means, the latter exemplified by terrorism, itself more easily achieved as a result of improved communication, both in transport and by reason of technological advances.³ Similarly, asylum seekers and illegal immigrants are more easily able to move from the country they seek to escape: physically due to an improving infrastructure, but

¹ 'Man is no longer indigenous, native to one place; he is global': Finkelkraut A, *In the Name of Humanity: Reflections on the Twentieth Century* (London: Pimlico, 2001) 105. By virtue of this integration the world becomes more interdependent: see Twining W, *Globalisation and Legal Theory* (London: Butterworths, 2000) 5. Boaventura de Sousa Santos emphasises the pace of globalisation, when writing 'One of the transformations most commonly associated with globalization is time-space compression, that is, the social process by which phenomena speed up and spread out across the globe': Santos B de S, *Toward A New Legal Common Sense: Law, Globalization, And Emancipation*, Second Edition (London: Butterworths LexisNexis, 2002) 179.

² A 'tribalism' emanating, for instance, from the former Yugoslavia in contrast to a homogeneous state or region: see, for example, Finkelkraut, *ibid*, 97. Thus Michael Hardt and Antonio Negri contend that the legacy of modernity is one of violence: Hardt M and Negri A, *Empire* (Cambridge, MA: Harvard University Press, 2001) 46.

³ Technological advances, for instance, of media communication and the communications industry are relevant not only in this respect, but are of significance generally with regard to globalisation: 'Communication not only expresses but also organizes the movement of globalization' (Hardt and Negri, *ibid*, 32). John Gray argues that the worldwide spread of new technologies, creating a global economy, results in 'an anarchy of sovereign states, rival capitalisms and stateless zones': Gray J, *False Dawn: The Delusions of Global Capitalism* (London: Granta Books, 1998) 194.

also others are more aware of their plight through increased knowledge available to them by means of the media or by the Internet. In consequence of this increased knowledge, greater assistance is available to those seeking a new state. This assistance may be voluntary or on a commercial basis, and the latter may lead the immigrant, the refugee, into a fresh set of problems.

As lawyers, we may ask whether ‘the law’, either the law of a state or international law, has adapted to a changing world order and whether it meets the demands now placed upon it. This was brought home to me in November 2003, when travelling in the Himalayas and encountering a group of Tibetan refugees who, with their Han Chinese guides, had crossed the border into Nepal. Illicit migration from Tibet still continues more than fifty years after the Chinese Communist occupation of Tibet and more than forty years after the flight of the present Dalai Lama to India. While the phenomenon is fixed in the context of the historical relationship between Tibet and China and of issues relating to human rights, in and of itself it raises issues of wider significance: those relating to the physical movement of peoples and the fluidity of political and legal identity. It also has particular relevance to the modern doctrine of external self-determination, set in the context of the concept of sovereignty and territorial integrity, and raises questions of autonomy.⁴

In this background the thesis has its genesis and the aims and objectives of the research become visible.

⁴ The modern doctrine of self-determination is in contrast to the principle of sovereignty, which aims to protect the status quo. Self-determination is a right held by ‘peoples’ as opposed to states, and has the potential in its external form to change the status quo. See Seidel G, ‘A New Dimension of the Right of Self-Determination in Kosovo?’ in C Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer Law International, 2002) 203-215, 203; also Chapters 2 and 6 below generally re self-determination; section 2.3.1 re peoples; and Chapter 4 generally re sovereignty.

1.2 Aims and Objectives

Two issues are paramount in the thesis: the first, the particular, relates to Tibet, and the second, on a general level, to self-determination. Thus the principal objective of the thesis is to find out and understand why, in a rapidly changing world, Tibet has been unable to achieve the statehood and self-determination it seeks, while, at the same time, so many years after the Chinese occupation of Tibet, the Tibet Question remains unresolved. To this end, the main aim of the thesis is to conduct an examination of the legal theory of self-determination and its limitations, and in doing so against the backdrop of Tibet further objectives are to ascertain how the international legal system and the legal theory on which it is premised have impacted on the relationship between China and Tibet. In contextualising the aims and objectives relating to the particular issue, it is first necessary to consider the nature of what may be termed ‘the Tibet Question’.

The Tibet Question is one that centres on territory and control. It has various facets: it is about what is or should be the political status of Tibet – whether it is a part of China or historically an independent state;⁵ whether it should be an independent state, and if so what is the extent of that state? If not an independent state, issues of its status within China arise. For Barry Sautman, the Tibet Question is ‘one of the world’s most

⁵ An ‘inalienable’ part of China, as claimed by the Chinese authorities, or ‘a fully-fledged independent country, as the Tibetan government-in-exile claims’: Tibet Information Network, *Unity and discord. Music and politics in contemporary Tibet* (London: Tibet Information Network, 2004) 8. See also Sautman B and Dreyer JT, ‘Introduction: The Tibet Question in Contemporary Perspective’ in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 3-22, 5.

intractable conflicts . . . [inter alia] a long-running ethnic dispute that has persisted into the post-Cold War era of rising nationalism . . . [and] a sovereignty dispute'.⁶

Consequently it is a question at the nub of which is independence. However, commentators also focus on human rights issues, and hence the issue can become one of nationalism or ethno-nationalist struggle for self-determination. Melvyn Goldstein specifically refers to it as 'a conflict about nationalism – an emotion-laden debate over whether political units should directly parallel ethnic units'.⁷ There are various ways of looking at the Tibet Question,⁸ some of which are more esoteric than others. The legal questions spill over into the political and into the religious, even into idealist Western concepts of Shangri-La,⁹ and thus the debate and the participants in the debate take on an elusive quality, the shape of the debate yielding to a variety of pressures. For China the practical question, however, is one of territorial integrity, historical continuity as opposed to invasion, and one relating to interference by other states, and also human rights proponents, in the internal affairs of the People's Republic.¹⁰

These issues surrounding the Tibet Question will become apparent in the course of this thesis, and, in examining the substantive issues of the question, it will seek to analyse a potential way forward. As the Dalai Lama, the spiritual and political leader

⁶ Sautman B, 'The Tibet Issue in Post-Summit Sino-American Relations' (1999) 72(1) *Pacific Affairs* 7-21, 11-12; also Sautman and Dreyer, note 5 above, 3.

⁷ Goldstein MC, *The Snow Lion and the Dragon: China, Tibet, and the Dalai Lama* (Berkeley and Los Angeles, CA: University of California Press, 1997) ix.

⁸ Klieger PC, 'Riding High on the Manchurian Dream: Three Paradigms in the Construction of the Tibetan Question' in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 214-229, 227.

⁹ Ibid 224-227.

¹⁰ See, for instance, Mountcastle A, 'The Question of Tibet and the Politics of the "Real"' in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 85-106, 86; also see Goldstein, note 7 above, for instance at 130 with regard to 'China's extreme sensitivity to outside intervention in its internal affairs'; and section 3.2 below.

of the Tibetans, enters his later years,¹¹ a window of opportunity to achieve some form of reconciliation may become apparent to both China and Tibet. This may be given impetus by the People's Republic's desire to bring Taiwan back to the motherland; any burgeoning dispute with Tibet is likely to be counter-productive in this regard. Conversely, the Dalai Lama's death potentially gives impetus to the Tibetan independence movement, if the Dalai Lama is seen as a moderate brake on that movement. Increasing global terrorism in a fragile political international environment may impact on this independence movement.

There are therefore reasons to suppose the time is ripe for a full consideration of the Sino-Tibetan relationship,¹² and in so doing international law comes to the fore in the contexts of sovereignty, human rights and also the principal theory around which this thesis is constructed: self-determination. Self-determination as a principle has evolved during the last century, and particularly interesting developments have emerged in recent years culminating in the proposals of 2007 relating to the Kosovo Status Settlement, which have important potential implications for Tibet. Such an appraisal of the relationship between China and Tibet enables us to see the Tibet Question contextually as one concerned with sovereignty and territorial integrity over Tibet,¹³ self-determination of the Tibetan people, and also human rights with reference to that people. It also enables us to consider the implications for international law of the failure to resolve the issues surrounding the Tibet Question, in a scenario where the dynamic principle of external self-determination is on the cusp of extending its reach, exerting pressures on the norm of sovereignty, and what has seemed to be a bar on

¹¹ The present Dalai Lama was born on 6 July 1935.

¹² A consideration that falls properly not only to the most affected political leaders, but also to scholars and to proponents of both the Chinese and Tibetan views, as well as leaders of international organisations: the United Nations and its derivative bodies.

¹³ Whether over the Tibet Autonomous Region or ethnographic Tibet; see section 3.5.2 below.

unilateral secession is called into question. Consequently, the analysis of self-determination becomes the general focus of the thesis.

1.3 Theory, Methodology and Literature

There is a great volume of literature on the subject of public international law, including sovereignty and self-determination, and also human rights. These works tend to consider Tibet, if at all, in passing. Conversely, much of the literature on Tibet, in the legal and political context, focuses on the Tibet Question, or the Tibetan problem, and tries to fit this into international law perspectives of sovereignty or self-determination, or indeed to focus on human rights abuses.

This thesis, targeting a gap in the literature, approaches the subject in a different fashion. It analyses in depth the law relating to self-determination, taking that as the basis. The Tibetan situation is then examined, issues relating to sovereignty and human rights are considered, before conclusions are reached with regard to self-determination itself and also with regard to its impacts on the Tibet Question. In addition, the thesis seeks to clarify the appropriate focus for the question in the current climate.

1.3.1 Theory

The theory underpinning this thesis is that of self-determination. The thesis will undertake a detailed study and analysis of the theory,¹⁴ a theory that is potentially in conflict with dominant norms in international law of sovereignty and territorial integrity, and when considering the theory it has to be borne in mind that a right to

¹⁴ The theory of self-determination and its history is considered more fully throughout the thesis, especially in Chapters 2 and 6.

unilateral secession has not been recognised in international law; consequently secession is not a right of self-determination. At its most basic level, self-determination is 'a principle concerned with the right to be a State',¹⁵ but the journey undertaken by the principle has brought about a situation where examination is required both of 'external' and 'internal' self-determination, as well as analysis as to identification of the units of self-determination. This main theory and its evolution do not, however, stand alone in the thesis. Just as there is an interrelationship between self-determination and other international legal norms, self-determination must operate in a political environment. As Tibet is essentially a political question as much as a legal one, and as both international law and politics are in issue, it is appropriate to complement the legal theory of self-determination with a theory apposite to politics.

Various political subtexts have been considered, and ultimately rejected in favour of a subtext of political realism. The People's Republic of China, of which Tibet currently forms a part, is a powerful nation, a permanent member of the United Nations Security Council, and a major actor on the world stage. Power is a concept of vital importance in political realist theory and, according to Stephen Krasner, 'for a very large class of global issues, indeed the classic agenda of the study of international politics – security, autonomy, and the distribution of valued resources – power needs to be given pride of place'.¹⁶ In such issues it is necessary, therefore, to consider

¹⁵ Crawford J, *The Creation of States in International Law*, Second Edition (Oxford: Clarendon Press, 2006) 107.

¹⁶ Krasner SD, 'Global Communications and National Power: Life on the Pareto Frontier' in DA Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993) 234-249, 246. See also Baldwin DA, 'Neoliberalism, Neorealism, and World Politics' in DA Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993) 3-25, 15. Power is indeed a central dimension of globalisation, and thus remains significant in an increasingly interdependent world where 'politics' is global in nature: see Ward I, *A Critical Introduction to European Law* (London: LexisNexis, 2003) 212; Giddens A and

relative power capabilities, as these ‘draw attention to how the payoff matrix was structured in the first place, how the available options are constrained, who can play the game, and, ultimately, who wins and loses’.¹⁷ One factor to be considered in the thesis then is the nature of the Tibet issue, whether it is global or international in nature, or one that is internal to China, for, if an internal issue, support for Tibet will particularly be determined by whether state actors are prepared to intervene in the affairs of another country. However, it may be that there is a lessening of a fine distinction between international and internal matters, and that states are now more inclined to intervene against the territorial integrity of other nations than previously even in instances where their own security, or expansion, is not in direct issue.¹⁸

It has been said that realism encompasses five propositions.¹⁹ The first is that states are the major actors in world affairs: ‘States are the units whose interactions form the structure of international-political systems.’²⁰ This is not to say, however, that they are the only actors, or indeed that their actions are unconstrained. Secondly, states behave rationally as they are penalised in the international sphere ‘if they fail to protect their vital interests, or if they pursue objectives beyond their means’.²¹ Thirdly, ‘international anarchy is the principal force shaping the motives and actions of states’.²² This in turn links with the fourth proposition: the concept that ‘states in anarchy are preoccupied with power and security, are disposed toward conflict and

Hutton W, ‘In Conversation’ in W Hutton and A Giddens (eds), *On the Edge: Living with Global Capitalism* (London: Vintage, 2001) 1-51, 41.

¹⁷ Krasner, *ibid*, 246-247.

¹⁸ See sections 6.3.2 and 6.3.3 below, and also Chapter 7.

¹⁹ Grieco JM, ‘Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism’ in DA Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993) 116-140, 118.

²⁰ Waltz KN, *Theory of International Politics* (New York: McGraw-Hill, Inc., 1979) 95; Grieco, note 19 above, 118.

²¹ Grieco, *ibid*; see also Waltz, note 20 above, 79-128.

²² Grieco, *ibid*. Here anarchy may be interpreted as referring ‘to a lack of common government in world politics’: Axelrod R and Keohane RO, ‘Achieving Cooperation Under Anarchy: Strategies and Institutions’ in DA Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993) 85-115, 85.

competition, and often fail to cooperate even in the face of common interests'.²³ This is a proposition that premises conflict; it is a proposition in tune with remarks of Raymond Aron to the effect that 'Politics, insofar as it concerns relations among states, seems to signify – in both ideal and objective terms – simply the survival of states confronting the potential threat created by the existence of other states', and further that 'If a province, an integrated portion of the state's territory or a fraction of the population, refuses to submit to the centralized power and undertake [sic] an armed struggle, the conflict, though civil war with regard to international law, will be considered a foreign war by those who see the rebels as the expression of an existing or nascent nation'.²⁴

The aforementioned propositions are of considerable import in analysing not only the stance taken by the People's Republic with respect to Tibet, but also the reaction of the international community, individually and collectively, to the Chinese occupation of Tibet, initially and subsequently, and also in light of an evolving principle of self-determination. Finally, by the fifth proposition inherent in realism, international institutions only have marginal effect on the prospects for co-operation among nations.²⁵ Thus the fifth proposition returns to the first proposition, that states are the major actors in world affairs.

Political realism, then, accounts for the way in which states seek to protect their own security and interests, for their behaviour and the outcomes of that behaviour. In turn it has been identified with a character of politics termed *realpolitik*. The elements of *realpolitik* were listed by Kenneth Waltz as follows: 'The ruler's, and later the state's,

²³ Grieco, *ibid*, 119.

²⁴ Aron R, *Peace and War: A Theory of International Relations*, translated from the French by R Howard and AB Fox (New York: Frederick A Praeger, 1967) 6 and 7 respectively. In this regard the distinction between international and internal matters becomes blurred.

²⁵ Grieco, note 19 above, 119.

interest provides the spring of action; the necessities of policy arise from the unregulated competition of states; calculation based on these necessities can discover the policies that will best serve a state's interests; success is the ultimate test of policy, and success is defined as preserving and strengthening the state.'²⁶

It is only by recognising China's position as a dominant world power that an evaluation of the Tibet Question and its outcomes can be attempted. It is for this reason that an alternative theory of idealism, neoliberalism, must be rejected. Such theoretical basis would find emphasis in espousal of ideas of a world civilisation and world citizenship,²⁷ in the promotion of the idea that domestic affairs have primacy over foreign affairs, a denunciation of military alliances and in challenging the idea that peace could be ensured through the balance of power; proponents of such theory have 'emphasized the mutual interests of states and advocated free trade, which they [have] argued would help prevent war'.²⁸ The conjoining of the idea of free trade promoting peace with the idea of an international organisation, universal in nature, promoting the same goal was the brainchild of US President Woodrow Wilson,²⁹ and idealism came to the forefront subsequent to the First World War in notions of self-determination.³⁰ Yet this early variant of the theory of self-determination has not proved to be lasting, and in its idealism its effects were limited.³¹ Further, when considering Tibet it is important not to fall into the trap of conceiving of the entity as

²⁶ Waltz, note 20 above, 117.

²⁷ The association of ideals with humanitarian aspirations: see Mountcastle, note 10 above, 97. 'The vision of a world polity that would end international anarchy and war is a recurring theme in political thought': Held D and Koenig-Archibugi M, 'Introduction: Whither American Power?' in D Held and M Koenig-Archibugi (eds), *American Power in the Twenty-First Century* (Cambridge: Polity Press, 2004) 1-20, 14.

²⁸ Baldwin, note 16 above, 12.

²⁹ Ibid.

³⁰ Section 2.2 below.

³¹ As evidenced, for example, by the failure of the Kurds to achieve self-determination, although this was on the agenda at the time and supported by Woodrow Wilson: see section 2.4.2.3 below.

a Shangri-La – an imaginary paradise, an ideal in itself.³² Tibet is an entity in the real world and sharp focus on the Tibet Question is required.³³

The connotation of realism ‘is one of looking at the world as it really is’,³⁴ as an objective reality, and a recognition of the importance of the nation state and of sovereignty.³⁵ As a subtext, a secondary theory, political realism and *realpolitik* provide an appropriate and recurrent theme throughout the thesis, giving visibility to the aims and objectives outlined in section 1.2 above and giving strong support to and validating the principal theory elaborated in the thesis, that of self-determination.

1.3.2 Methodology: A Library-Based Research Study

The thesis requires a methodology that is complementary to both its aims and objectives and also to the theory applied. The nature of the aims and objectives are investigative and interpretive; an examination of the reality of the Sino-Tibetan relationship and the external forces that have shaped it, together with an analysis of

³² Also the name of a hidden Tibetan valley in J Hilton’s 1930s novel, *Lost Horizon*: see *The Concise Oxford Dictionary of Current English*, Ninth Edition (Oxford: Clarendon Press, 1995).

³³ For this reason, too, a postmodern approach has been rejected. This approach has its attractions, as ‘One of the central themes of post-modernism . . . is its insistence on the value of looking at things from multiple points of view’ (Twining, note 1 above, 212), and I have noted that full consideration of the Sino-Tibetan relationship falls properly to a plurality of voices (note 12 above). Further, postmodernism is related to ‘the need to respond contextually and strategically to shifting frameworks of power and resistance, and to articulate a fuller recognition of multiplicity and difference’: Squires J, ‘Introduction’ in J Squires (ed.), *Principled Positions: Postmodernism and the Rediscovery of Value* (London: Lawrence & Wishart, 1993) 1-2. Such an approach is evinced by Hardt and Negri, note 2 above, in their treatise on empire and the counter-power of the multitude, but despite its capacity for development it is suggested that it is the power of elites, be they the elites of the nation state or indeed within the ‘constituted power of empire’ (Hardt and Negri, *ibid*, 361) that remain apt at the present juncture.

³⁴ Baldwin, note 16 above, 9. In this context, it has been said that ‘Scholars belonging to the “realist” school of international studies dismiss the idea of global democracy as inappropriate to the international realm, which is necessarily governed by the rules of power politics’: Held and Koenig-Archibugi, note 27 above, 15.

³⁵ As William Twining points out, even such postmodern theorists as Boaventura de Sousa Santos concede that in the medium and short term ‘the nation state is likely to remain by far the most significant actor at nearly all levels’: Twining, note 1 above, 223; ‘The nation-state and the interstate system are the central political forms of the capitalist world system, and they will probably remain so for the foreseeable future’, and further that they ‘will remain, in the foreseeable future, a major focus of human rights struggles’: Santos, note 1 above, 94 and 283 respectively.

the causes and effects interlinking that relationship with international legal norms and *realpolitik*. The thesis conducts an examination of these legal norms and their evolution.

At its core the thesis represents a case study. Its focus indeed determines that. In examining concepts of human rights incorporating self-determination, minority rights and oppression, contextually allied to issues of sovereignty, a Chinese Tibetan perspective is brought to the forefront. The issue is then one of how the case study should be resolved. Various options were considered and rejected. These included a process that would incorporate a number of interviews and questionnaires. It was decided, however, not to utilise an empirical study due to difficulties in language and in finding a sufficiently representative body, which would need to involve both Han Chinese and Tibetan participants. For similar reasons an ethnographic approach was also rejected.

Fieldwork, indeed, is not the *raison d'être* of this research, although issues of nationalism and ethnicity are a part of the Tibet Question.³⁶ Independence and self-determination are at the heart of the question, and an appraisal of relevant legal theory and norms is the structure on which the thesis is founded. Thus, rather than just the narrow focus of the Tibet Question, larger theoretical questions relating to the principle of self-determination are significant to the thesis. The two aspects of the research issues, both the particular and the general, require a more conceptual, library-based research study, analysing content in an approach which is both critical and constructive as the thesis conducts an examination of international law as it is and how, in an objective manner, it may be interpreted, while at the same time it points to

³⁶ See section 1.2 above.

the potential of an effective alternative strategy for Tibet.³⁷ This then is the appropriate methodology to pursue. The nature of this library base is the focus of the next section.

1.3.3 Literature Review

Both primary sources and secondary sources feature widely throughout this thesis, the former comprising both formal instruments and case law. The thesis includes an Appendix of Primary Sources, and also a full Bibliography detailing the secondary sources.

1.3.3.1 Primary Sources

These include reference to and interpretation of international treaties such as the United Nations Charter,³⁸ the International Covenant on Civil and Political Rights,³⁹ and the International Covenant on Economic, Social and Cultural Rights.⁴⁰ In addition the 1982 Chinese Constitution is analysed, as are certain internal Chinese laws and also White Papers, such as those of 1991 on ‘Human Rights in China’ and 1992 on ‘Tibet – Its Ownership and Human Rights Situation’.⁴¹ Provisions of the Montevideo Convention on Rights and Duties of States are considered,⁴² and reference is made to the 1969 Vienna Convention on the Law of Treaties.⁴³

³⁷ cf Hardt and Negri, note 2 above, 47-48.

³⁸ The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

³⁹ Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

⁴⁰ Adopted 16 December 1966, entered into force 3 January 1976, 999 UNTS 3.

⁴¹ See sections 5.3.1 and 5.3.2 below.

⁴² 165 LNTS 19. The Convention was signed at Montevideo on 26 December 1933 and entered into force on 26 December 1934. See section 4.2.1 in particular.

⁴³ Done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.

A number of additional treaties and conventions are mentioned in the course of the thesis, among others those concerning Tibet are referred to, including the Simla Convention of 1914 involving Britain and China,⁴⁴ and in the context of the Tibetan government in exile reference is made to the 1991 Charter of the Tibetans in-Exile.⁴⁵ There is, in addition, particular consideration of the 1951 Agreement on Measures for the Peaceful Liberation of Tibet.⁴⁶ The thesis also makes mention of numerous resolutions of the United Nations General Assembly and also the United Nations Security Council; such resolutions are not confined to Tibet but also include resolutions relating to, for example, Kosovo. In that context there is also mention of various constitutions of the Balkans, including the 1974 Yugoslav Constitution.⁴⁷

Primary sources in the thesis also take the form of case material. Important cases with regard to self-determination are referred to and analysed as appropriate. These include the *Western Sahara Case*,⁴⁸ *East Timor (Portugal v Australia)*,⁴⁹ and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁵⁰ The important European case of *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* is also referred to,⁵¹ as is the relevant *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* with reference to norms of

⁴⁴ See section 4.4.2.4 below; also section 3.2.1 below.

⁴⁵ The Charter is available at <<http://www.tibet.com/Govt?charter.html>>. See section 4.4.2.3 below.

⁴⁶ The translated text of the agreement can be found in various places including, for example, van Walt van Praag MC, *The Status of Tibet: History, Rights, and Prospects in International Law* (London: Wisdom Publications, 1987) 337-340; also <<http://www.freetibet.org/info/file/file2.html>>, accessed 3 August 2005.

⁴⁷ The Constitution of the Socialist Federal Republic of Yugoslavia, promulgated on 21 February 1974, and reprinted in part in Trifunovska S, *Yugoslavia Through Documents: From its creation to its dissolution* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1994) 224-233.

⁴⁸ Advisory Opinion, ICJ Reports 1975, 12.

⁴⁹ ICJ Reports 1995, 90.

⁵⁰ Advisory Opinion, ICJ, 9 July 2004; (2004) 43 *International Legal Materials* 1009.

⁵¹ Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* Judgment of the Court of First Instance of 21 September 2005.

customary international law.⁵² In addition to international cases of consequence, Canadian and Australian cases are considered in the context of moves towards internal self-determination,⁵³ as is the Draft Declaration on the Rights of Indigenous Peoples, adopted in 1994.⁵⁴

1.3.3.2 Secondary Sources

A range of secondary sources has been examined and analysed, sources in respect of public international law generally, and on Tibet in particular. So far as the former are concerned, major works by authors such as James Crawford and Ian Brownlie feature, as well as *Cases and Materials on International Law* by DJ Harris, and Steiner and Alston's *International Human Rights in Context*.⁵⁵ There is reference to volumes by Hurst Hannum, Neil MacCormick, Neil Walker and Christian Tomuschat, and in respect of self-determination works by Antonio Cassese and Margaret Moore have been particularly useful,⁵⁶ as have works by William Twining, Boaventura de Sousa Santos, and by Michael Hardt and Antonio Negri in the context of globalisation.⁵⁷

⁵² ICJ Reports 1986, 14. Also in this context the Advisory Opinion of the International Court of Justice of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996, 226, accessible at <<http://www.icj-cij.org/docket/files/95/7495.pdf>>.

⁵³ Section 2.4.2.4 below.

⁵⁴ (1995) 34 *International Legal Materials* 546.

⁵⁵ Crawford J, *The Creation of States in International Law*, note 15 above, and see also his edited volume *The Rights of Peoples* (Oxford: Clarendon Press, 1988); Brownlie I, *Principles of Public International Law*, Sixth Edition (Oxford: Oxford University Press, 2003), and see also, for example, *Treaties and Indigenous Peoples: The Robb Lectures 1991* (ed. FM Brookfield) (Oxford: Clarendon Press, 1992); Harris DJ, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004); Steiner HJ and Alston P, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Second Edition (Oxford: Oxford University Press, 2000).

⁵⁶ Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition (Philadelphia: University of Pennsylvania Press, 1996); MacCormick N, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999); Walker N (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003); Tomuschat C, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003); Cassese A (ed.), *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn – The Netherlands: Sijthoff & Noordhoff, 1979); Cassese A, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995); Moore M (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998).

⁵⁷ Twining W, *Globalisation and Legal Theory*, note 1 above; Santos B de S, *Toward A New Legal Common Sense*, note 1 above; Hardt M and Negri A, *Empire*, note 2 above.

Works most concerned with specific areas of international law are considered throughout the thesis where relevant.

With specific reference to Tibet, *The Status of Tibet* by Michael van Walt van Praag is a defining text on Tibet's status.⁵⁸ Although this volume was published twenty years ago and the author is closely linked with the Tibetan independence movement, he writes directly on the issue of the status of Tibet in international law. Significant works by Melvyn Goldstein, Tom Grunfeld, Tsering Shakya and John Avedon have been consulted, as have volumes by Jane Ardley and Dawa Norbu, and edited volumes by Cao Changching and James Seymour and by Barry Sautman and June Dreyer, among others.⁵⁹

In the wider contexts of public international law, self-determination, human rights and sovereignty, and in the narrower field of Tibet, journal articles have been researched and a number of Internet sources consulted. In the Sino-Tibetan area, where facts and perspectives are strongly divergent, a balance has been attempted between the points of view, and thus, for instance, on the one hand, websites of the China Internet Information Center, the Ministry of Foreign Affairs of the People's Republic of China, and People's Daily Online have been accessed, as have, on the other hand, websites of the Government of Tibet in Exile, the Tibetan Centre for Human Rights

⁵⁸ Van Walt van Praag MC, *The Status of Tibet: History, Rights, and Prospects in International Law*, note 46 above.

⁵⁹ Goldstein MC, *A History of Modern Tibet, 1913-1951: The Demise of the Lamaist State* (Berkeley and Los Angeles, CA: University of California Press, 1989) and *The Snow Lion and the Dragon: China, Tibet, and the Dalai Lama*, note 7 above; Grunfeld AT, *The Making of Modern Tibet*, Revised Edition (Armonk, New York, and London: ME Sharpe, 1996); Tsering Shakya, *The Dragon in the Land of the Snows: A History of Modern Tibet Since 1947* (London: Pimlico, 1999); Avedon JF, *In Exile from the Land of Snows: The Dalai Lama and Tibet Since the Chinese Conquest* (New York: HarperPerennial, 1994, reissued 1997); Ardley J, *The Tibetan Independence Movement: Political, religious and Gandhian perspectives* (London and New York: RoutledgeCurzon, 2002); Dawa Norbu, *China's Tibet Policy* (Richmond, Surrey: Curzon Press, 2001); Cao Changching and Seymour JD (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998); Sautman B and Dreyer JT (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006).

and Democracy, and the International Campaign for Tibet.⁶⁰ More generally, productive Internet sources, such as various United Nations websites and Keesing's Record of World Events, have been referred to.

The texts consulted both with regard to public international law and with respect to Tibet provide a sound basis for the thesis and are supplemented by the journal articles and Internet sources which supply up-to-date material. All such secondary sources are fully referenced in the Bibliography and are detailed and commented upon throughout the text as appropriate, each chapter reviewing and analysing literature pertinent to its content.

1.4 Summary of the Structure of the Thesis

Turning to the substance of the thesis, Chapter 2 begins the exploration of the theory of self-determination with an examination of the historical background, then proceeding to look at issues inherent in the theory. The definition of 'peoples' entitled to self-determination is considered, as is the relationship of the theory with norms of sovereignty and territorial integrity and also human rights. An analysis of the theory as rule or principle then takes place, and the thesis goes on to look at the dynamism of the theory before finally touching on the philosophical debate between choice theorists and remedial right theorists.

Having explored central issues and conflicts attributable to the legal theory of self-determination and noted that, for Tibetans, self-determination has to date failed to bring about the freedom they seek, Chapter 3 delves more deeply into the relationship that has subsisted between China and Tibet. A brief examination of Tibet prior to the

⁶⁰ Respectively, websites <<http://www.china.org.cn/english/index.htm>>, <<http://www.fmprc.gov.cn>>, <<http://english.peopledaily.com.cn>>, <<http://www.tibet.com>>, <<http://www.tchrd.org>>, and <<http://www.savetibet.org>>.

Chinese insurgence of 1950 is conducted, before that insurgence and its aftermath is focused upon. The 1951 Agreement on Measures for the Peaceful Liberation of Tibet is considered from both the Chinese and Tibetan perspectives, and the impacts of that Agreement are discussed, including matters such as the collapse of Tibet as a state and the international response to the measures imposed on Tibet. Four key issues are identified, fluidity of political and legal identity, autonomy, the relevance of the remedial right theory to Chinese Tibet, and physical movement of peoples.

The issues identified all bear not only on self-determination but also on sovereignty, and thus Chapter 4 proceeds to look at that topic. The criteria for statehood are considered and elements identified prior to a discussion of recognition of statehood. China's relationship with international law and the wider international community is discussed before changing concepts of sovereignty are focused upon. The second part of the chapter deals with issues of Tibetan sovereignty and analyses the elements of statehood in this context, proceeding to examine issues relating to recognition of Tibet as an independent state. Finally, conclusions are reached regarding Tibet and independent statehood in a discussion bearing on the current pressures on sovereignty and the integrity of the state. Despite such pressures an independent Tibet has not been recognised by any state, and thus the thesis returns to the theory of self-determination.

Due to the nexus between self-determination and human rights, Chapter 5 examines human rights in the Sino-Tibetan context. A note of the momentum of the international human rights movement begins the chapter, which then considers priorities under the human rights regime, examining universalism and relativism and the Bangkok Declaration. The Chinese Constitution of 1982 is reviewed in the context

of human rights, as are Chinese legislation and White Papers and also China's role in the international human rights regime. The chapter then moves on to examine oppression of the Tibetan minority in some detail, exploring oppression in respect of civil and political rights and also economic, social and cultural rights. The chapter ends with a section on human rights as a challenge to sovereignty, concluding that it is relevant to assess whether an expansion of the collective right of self-determination may lead to a reconsideration of the status of Tibet.

Chapter 6 therefore comes back to the main theory running through the thesis, that of self-determination, and looks at the recent momentum attained by self-determination. The ongoing debate between choice theorists and remedial right theorists is focused on, as are developments with regard to secession as a concept. The new progression in the theory is analysed with particular reference to Kosovo, leading up to and including the Final Comprehensive Proposal for a Kosovo Status Settlement of 14 March 2007. The ongoing momentum to intervention by the international community is discussed before the chapter considers issues of autonomy, which are analysed in the Tibetan context. The chapter draws to an end with an analysis of the Tibet Question, bearing in mind, first, the concept of supervised statehood emanating from the Kosovo Status Settlement and, secondly, the potential relevance of the remedial right theory of self-determination.

Chapter 7, the concluding chapter, proceeds with specific analysis both in respect of the development comprising the Kosovo Status Settlement and of applying a Kosovan perspective to Tibet, this perspective prospectively giving a fresh and sharp focus to the Tibet Question. Finally, the chapter considers the implications for public international law and its norms, resulting from the long-standing failure to bring about

a resolution of the issues surrounding Tibet. The subtext of realism permeates the thesis, as does the principal theory of self-determination, to which I now turn.

2 The Evolving Boundaries of the Legal Theory of Self-Determination

2.1 Introduction

Self-determination is a concept that connotes images of freedom, yet for many across the globe it represents nothing but fractured hopes. The purpose of this chapter is to explore issues and conflicts inherent in the theory in an analysis preliminary to examination of the failure to date of norms of public international law to resolve the Tibet Question. The theory has proved dynamic in its evolution, but has not succeeded in stemming the physical movement of peoples and indeed has contributed to the fluidity of political and legal identity. At the same time, it has proved limited as it comes up against other established norms of international law. Before critically evaluating the theory it is necessary to establish its current parameters.

2.2 History

While relatively modern in acceptance as a legal theory, the political origins of the concept of self-determination go back to the eighteenth century and the American Declaration of Independence of 1776 and the French Revolution of 1789.¹ The legal theory traces forward to the twentieth century and has had different meanings in different contexts.² In the aftermath of the First World War the League of Nations was established by the victorious Allied Powers and the League's Covenant, its charter,

¹ Cassese A, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) 11.

² Foster CE, 'Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12(1) *European Journal of International Law* 141-157, 143.

was approved at the 1919 Paris Peace Conference as part of the Treaty of Versailles.³

The theory of self-determination was ‘politically popular at the time of the Peace Settlement of 1919-20 in Europe’, and the effect was that minorities who found themselves on ‘the wrong side of boundaries of new States’ had the option to change their nationality or on occasion were ‘the subject of large-scale population transfer and exchange’.⁴ There was not, however, acceptance of self-determination as a general principle at this time,⁵ and it had different connotations for major actors: it was the essence of a lasting peace in Europe for US President Woodrow Wilson, yet for Vladimir Lenin it was ‘a means of realizing a dream of world-wide socialism’.⁶ The political implications of self-determination are thus evident at this early stage.

Essentially, specific provisions defining obligations were incorporated in the Treaty of Versailles, but these were limited in extent and, despite the influential authority of Woodrow Wilson, the principle of self-determination ‘was not specifically included in the Covenant of the League of Nations’.⁷ It was only those states signing the League’s minority treaties that came under any obligation to the League for the protection of minorities within their borders and the League in their approach sought to ‘suppress in the future those special conditions which give rise to minority grievances and can arguably legitimate a claim to self-determination . . . the League [rejected] self-determination and particularly secessionist self-determination as a further remedy for

³ The Covenant of the League of Nations is to be found in the Peace Treaty of Versailles of 28 June 1919. The Treaty may be accessed through the website of The World War I Document Archive at <<http://net.lib.byu.edu/~rdh7/wwi>>.

⁴ Brownlie I, *Treaties and Indigenous Peoples: The Robb Lectures 1991* (ed. FM Brookfield) (Oxford: Clarendon Press, 1992) 4.

⁵ Brownlie I, ‘The Rights of Peoples in Modern International Law’ in J Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 1-16, 5.

⁶ In Cassese, note 1 above, 13.

⁷ Buchheit LC, *Secession: The Legitimacy of Self-Determination* (New Haven and London: Yale University Press, 1978) 64.

minority groups'.⁸ This line was subsequently confirmed by a Commission of Rapporteurs to the Council of the League of Nations on the Aaland Islands question, for to allow minorities to withdraw from the state to which they belong 'would be to destroy order and stability within States and to inaugurate anarchy in the international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity'.⁹

It was after 1945 that the principle of self-determination was affirmed, but its application following the Second World War took a different approach, and the theory was applied to 'peoples under colonial domination',¹⁰ initially almost exclusively so.¹¹ The principle became enshrined in international law, in particular through Article 1(2) of the United Nations Charter¹² and subsequently through Article 1 of the International Covenant on Civil and Political Rights.¹³ Colonial domination, however,

⁸ Ibid 70. The minority treaties imposed 'no general principles of good government upon the signatory States . . . They merely [registered] certain conditions which had to be accepted by a limited number of European States who, as a result of the War, were receiving political recognition, or great increases in territory, at the hands of the principal Allied and Associated Powers': Dugdale BEC and Bewes WA, 'The Working of the Minority Treaties' (1926) 5(2) *Journal of the British Institute of International Affairs* 79-95, 79. The policy was to secure equality of citizenship among the inhabitants of the signatory states, who were to have equal freedom 'to practise their own religion, and speak their own language' (ibid), and in that way to counteract separatism, yet the minorities themselves were not parties to the treaties (ibid 79-80). Particular clauses in the Treaty of Versailles specified the obligations towards minorities, see for example Articles 86 and 93 regarding the 'Czecho-Slovak State' and Poland respectively. As to the separate peace treaties concluded, see Buchheit, note 7 above, 67-70 and the sources of the various treaties cited thereat.

⁹ Buchheit, ibid, 71; quoting from The Aaland Islands Question; Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League Doc B.7.21/68/106 (1921).

¹⁰ Crawford J, 'Some Conclusions' in J Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 159-175, 161.

¹¹ Emerson R, 'Self-Determination' (1971) 65(3) *American Journal of International Law* 459-475, 462.

¹² Article 1(2) of the Charter provides that a purpose of the United Nations is: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. Self-determination reappears in Article 55 of the Charter, which commences: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. Both articles represent self-determination as an aim, an aspiration, rather than a right or an obligation necessarily creating a legal effect, although under Article 56 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'

¹³ International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171. Also Article 1 of the International Covenant on Economic, Social and

was only applied to Western imperialism and not to Communist imperialism, although in the *Western Sahara Case* ‘the Court accepted . . . that the principle of self-determination is a part of customary international law’,¹⁴ the emergent norm being applicable to the decolonisation of those non-self-governing territories under the aegis of the United Nations.¹⁵

The post-Cold War era has seen a further shift in direction for the principle of self-determination, and it is the classification of self-determination as a general principle rather than a rule, albeit with a number of customary rules,¹⁶ which opens up the space for ideas and evolution. States are no longer the sole parties involved and interpretation of self-determination by the International Court of Justice in cases such as *East Timor (Portugal v Australia)*¹⁷ ‘has served as a point of entry into international law for newcomers, the newly returned and even the absent, and for their challenges to international law’s marginalization of them’.¹⁸ This interpretation, which may be connected with the decline of the nation state, has opened up the door for minorities to argue their case for self-determination. Thus ‘external’ self-determination, which was applied to the colonial situation, is now less commonly the issue, and the focus has turned towards the right of self-determination to guarantee ‘internal’ self-determination – a protection of the right ‘of national or ethnic groups within the state to assert some degree of “autonomy” over their affairs, without giving

Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, 999 UNTS 3. See section 2.3.1 below.

¹⁴ Harris DJ, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004) 116; see *Western Sahara Case* Advisory Opinion, ICJ Reports 1975, 12, para. 56. See also section 2.3.1 below. The UN General Assembly took note ‘with appreciation’ of the Advisory Opinion of the International Court of Justice in the *Western Sahara Case*: UNGA Resolution 3458 (XXX) of 10 December 1975, Question of Spanish Sahara.

¹⁵ Harris, *ibid*, 115; *Western Sahara Case*, *ibid*, para. 54.

¹⁶ Cassese, note 1 above, 126-133. See also the analysis in section 2.4.1 below.

¹⁷ ICJ Reports 1995, 90.

¹⁸ Knop K, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) 110; and see also 206.

them the right to secede'.¹⁹ The emphasis on 'internal' self-determination is linked with the democratic decision-making process²⁰ and is less in conflict with the integrity of the state than is 'external' self-determination, although issues surrounding intermeddling in the internal affairs of a state arise in each. It is also the case that few Western colonies now exist, and for the concept of self-determination to continue to be of significance beyond the context of decolonisation it has to evolve.

In any event, self-determination is now accepted as a legal principle,²¹ a customary legal right, and thus has both legal and political implications. As is evident from the above, though, the principle has proved contentious: not only in its content but also in its application. A particularly pertinent issue in many cases is the definition of 'peoples' entitled to the protection of the principle; for this definition is open to interpretation.²² In other words, while the principle of self-determination 'has become an accepted norm of international law', there is a lack of clear-cut boundaries to the principle.²³ This raises the question as to who is the holder of a right and, indeed, Tibet has not been treated as a right-holder. To enable consideration to be given as to why this should be, it is appropriate to consider issues and conflicts inherent in the principle. This in turn will shed light on the limitations of the principle.

¹⁹ Groarke P, *Dividing the State: Legitimacy, Secession and the Doctrine of Oppression* (Aldershot: Ashgate Publishing Limited, 2004) 84; see Cassese, note 1 above, 350-351. Internal self-determination can be understood as 'forms of self-government and separateness within a state rather than separation (so-called "external" self-determination) from the state': Steiner HJ and Alston P, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Second Edition (Oxford: Oxford University Press, 2000) 1249.

²⁰ Cassese, note 1 above, 64-65.

²¹ Brownlie I, *Principles of Public International Law*, Sixth Edition (Oxford: Oxford University Press, 2003) 555.

²² Knop, note 18 above, 34.

²³ Bhalla RS, 'The Right of Self-Determination in International Law' in W Twining (ed.), *Issues of Self-Determination* (Aberdeen: Aberdeen University Press, 1991) 91-101, 93-94.

2.3 Issues Inherent in the Theory

2.3.1 *Who Are 'Peoples'?*

Reference to self-determination of 'peoples' appears in Articles 1(2) and 55 of the United Nations Charter,²⁴ while Article 1 of the International Covenant on Civil and Political Rights,²⁵ and similarly Article 1 of the International Covenant on Economic, Social and Cultural Rights,²⁶ provides that '[a]ll peoples have the right of self-determination'. Nevertheless, as the theory has evolved, it is manifest that it has not been applied to all peoples or in all circumstances. A prerequisite to an analysis of the theory, therefore, is to consider who are 'peoples' intended to benefit from the right of self-determination.

Despite the articles mentioned above, 'peoples' remains undefined in the international instruments and uncertainty continues as to who may comprise 'peoples' intended to benefit: 'it is far from clear that peoples or nations rather than tribes, ethnic groups, linguistic, religious, or geographical groups are the relevant reference group'.²⁷ Subsequent to 1945 it was colonial peoples who benefited from the theory, and here it was national colonial boundaries that prevailed; states were not broken up to reflect ethnic groups and homogeneity was not the watchword behind the emergence of the new independent states, which followed 'generally artificial colonial borders'.²⁸

²⁴ See note 12 above.

²⁵ International Covenant on Civil and Political Rights, note 13 above.

²⁶ International Covenant on Economic, Social and Cultural Rights, note 13 above.

²⁷ Margalit A and Raz J, 'National Self-Determination' (1990) 87(9) *Journal of Philosophy* 439-461, 443. In his 'Law of Peoples', John Rawls uses the term 'peoples' to emphasise the 'singular features of peoples as distinct from states, as traditionally conceived': Rawls J, *The Law of Peoples: with 'The Idea of Public Reason Revisited'* (Cambridge, MA and London: Harvard University Press, 2001) 27, such features including, for example, the lack of traditional sovereignty.

²⁸ Knop, note 18 above, 55. See also Thornberry P, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991) 13-14. The principle behind the emergence of these newly independent states was *uti possidetis* – an extension of the principle that you keep what you now possess, in this context that these states retain their old colonial boundaries: as to the principle of *uti*

Further, it was very much Western imperialism in focus; and the principle of self-determination was not applied in practice to imperialism either of the Soviet Union or China due to the fact that such ‘colonies’ as they had were not geographically separate from but were contiguous with the administering state. It is the application to ‘overseas’ colonies that ensured socialist imperialism was exempt from the effects of the theory, and consensus had been drawn around the theory of ‘salt-water colonialism’ – colonial territories geographically separate from the administering country.²⁹ Self-determination as a concept from the standpoint of socialist governments is viewed as ‘the right that foreign States shall not interfere in the life of the community *against the will of the government*’.³⁰ This is one fundamental reason behind the position taken by China in respect of Tibet: it regards Tibet as an integral part of China, and therefore not subject to foreign interference. The right of the state to its own self-determination is accordingly a defence to interference in the state.³¹

possidetis, see Malanczuk P, *Akehurst's Modern Introduction to International Law*, Seventh Revised Edition (London: Routledge, 1997) 162-163. It is noteworthy that by UNGA Resolution 1514 (XV) of 14 December 1960, the Declaration on the granting of independence to colonial countries and peoples, while ‘The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental rights’ and ‘All peoples have the right to self-determination’, the resolution went on to declare that such dependent peoples should be enabled ‘to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected’. Self-determination was thus seen as a one-off right, exercisable to enable a colony to become an independent state. The resolution concluded by emphasising ‘non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity’.

²⁹ Thornberry, note 28 above, 17; see also UNGA Resolution 1541 (XV) of 15 December 1960, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter (Article 73 forms part of Chapter XI of the UN Charter, which constitutes the Declaration Regarding Non-Self-Governing Territories), Principle IV referring to ‘territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it’, and UN General Assembly Resolution 1514 (XV) of 14 December 1960, note 28 above.

³⁰ Cassese A, ‘Political Self-Determination – Old Concepts and New Developments’ in A Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn – The Netherlands: Sijthoff & Noordhoff, 1979) 137-165, 140, emphasis in original. See also Kamenka E, ‘Human Rights: Peoples’ Rights’ in J Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 127-139, 136. Self-determination can thus be seen as a political construct, changing its cloak only at the whim of the nation state, currently the nation states that are members of the United Nations.

³¹ See Emerson, note 11 above, 466.

In more recent years, in the post-Cold War era, ethnicity has come more to the fore. This emerges in the break-up of the Soviet Union,³² for example, and ethnic nationalism can be seen to prevail in the states emanating from the former Yugoslavia and the partition of Czechoslovakia into the Czech and the Slovak Republics.³³ Thus self-determination has moved into the socialist realm and away from the specific context of colonialism.

This though is not the full picture. Margalit and Raz argue that the encompassing group forming a substantial majority in a territory shall have the right to decide if that territory 'shall form an independent state in order to protect the culture and self-respect of the group'.³⁴ This argument has been made not just with reference to entities which can be separated, such as the Baltic States, leading to disintegration of multinational states along national lines,³⁵ but also with respect to indigenous groups. Indigenous peoples have been perceived as victims, and thus as actors 'deprived of sovereign rights, without participation in prevailing political arrangements'.³⁶ Chinese officials, though, imply that no indigenous peoples live in China, only minorities.³⁷

³² See section 2.4.2.1 below.

³³ See section 2.4.2.2 below.

³⁴ Margalit and Raz, note 27 above, 457. This argument is congruent with that of the choice theorists in respect of self-determination, see sections 2.4.3 and 6.2.1 below for analysis, and is problematic in that multiple fragmentation of states is the potential result of that strand of philosophical thought.

³⁵ See Moore M, 'Introduction: The Self-Determination Principle and the Ethics of Secession' in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 1-13, 1.

³⁶ Falk R, 'The Rights of Peoples (In Particular Indigenous Peoples)' in J Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 17-37, 18. 'Indigenous peoples may be defined as the original inhabitants of a territory who, because of historical circumstances (generally conquest and/or colonization by another people), have lost their sovereignty and have become subordinated to the wider society and the state over which they do not exercise any control': Stavenhagen R, 'The Indigenous Problématique' (1985) 50 *IFDA Dossier* 4, 4, quoted in Falk, *ibid*.

³⁷ Pitty R, 'Indigenous Peoples, Self-Determination and International Law' (2001) 5(4) *International Journal of Human Rights* 44-71, 47. This is buttressed by the 1982 Chinese Constitution, the current version, which for instance in Article 4 refers to minority nationalities. Note though that references do exist to ethnic groups, if not indigenous peoples, within the Chinese state: see, for example, Information Office of the State Council of the People's Republic of China, 'Tibet: China's Policy Paper on Tibet' (2004), *Unrepresented Nations and Peoples Organisation Home Page* <<http://www.unpo.org/article.php?id=655>>, accessed 4 November 2004, and section 3.3.3 below, and see also Sautman B, 'Ethnic Law and Minority Rights in China: Progress and Constraints' (1999) 21(3)

Nevertheless, issues of cultural identity and the value of cultural groups come to the fore, as exemplified by a series of cases in Australia and Canada and by the proceedings of the Working Group on Indigenous Populations in Geneva.³⁸ While the argument has not led to independence for any such group, it raises in particular questions of internal self-determination, and these will be alluded to in greater detail below.³⁹

The nature of a ‘substantial majority’ may itself be ambiguous, and occupying powers have manipulated units of self-determination by altering the balance of the population. Instances include population transfers from Turkey into Cyprus from 1976, from Indonesia into East Timor from 1975 and, pertinently, from China into Tibet from 1951.⁴⁰ Moreover, if Tibet can be viewed as a state independent of China, any attempt to alter the democratic population of Tibet by China would be illegal under international law.⁴¹ It is also the case that people may move from one state to another as a result of, rather than prior to, self-determination, for instance ethnic flows within

Law and Policy 283-314. In making the distinction between minorities and indigenous peoples, ‘Chinese officials have . . . adopted the semantic practice of other states by refusing to acknowledge indigenous peoples elsewhere as distinct entities’: Pitty, *ibid.* Robert Barnett comments that officials in China are now required to use the word ‘ethnicity’ rather than ‘nationality’ when referring to the peoples recognised as minority nationalities – thus nationality policy becomes ethnicity policy: Barnett R, ‘Beyond the Collaborator – Martyr Model: Strategies of Compliance, Opportunism, and Opposition Within Tibet’ in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 25-66, 56 note 33.

³⁸ Nettheim G, ‘“Peoples” and “Populations”: Indigenous Peoples and Rights of Peoples’ in J Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 107-126.

³⁹ See section 2.4.2.4 below.

⁴⁰ See Bowring B, ‘Whose Rights, What People, Which Community? The Rule of Law as an Instrument of Oppression in the New Latvia’ in P Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law* (Aldershot: Dartmouth Publishing Company Limited, 1995) 117-134, 131.

⁴¹ Article 49 of the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, entered into force 21 October 1950 (accessible at <<http://www.ohchr.org/english/law/civilianpersons.htm>>), states *inter alia*: ‘The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies’. Further, Article 85(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted 8 June 1977, entered into force 7 December 1979 (accessible at <<http://www.ohchr.org/english/law/protocol1.htm>>), states, *inter alia*: ‘the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions of the Protocol; (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies . . . in violation of Article 49 of the Fourth Convention’.

the former Yugoslavia.⁴² So all in all self-determination can be seen to highlight ethnic nationalism and is illuminated by ‘the clamor of peoples trapped in pluralistic states in which they have no dominant share to take charge of their own destinies’.⁴³

The nature of ‘peoples’ thus remains in a state of flux, more so as a variety of groupings seek to attain the benefits of self-determination at the same time as states claim for themselves what they would deny others.⁴⁴ It is nevertheless true to say that the status of the collective right to self-determination ‘depends on the recognition of the collective in question’,⁴⁵ and it is the case that any ‘claims to self-determination by minorities in established countries are typically ignored by other established powers, as internal issues to be settled by those within the country’.⁴⁶ This latter point brings self-determination directly into conflict with the norms of sovereignty and territorial integrity, yet the ability of self-determination to contribute to the fluidity of political and legal identity is certain as it expands its reach within a flexible definition of ‘peoples’.

2.3.2 The Conflict With Sovereignty and Territorial Integrity

The principle of self-determination does not exist in a vacuum. While it is endorsed by the United Nations, it has to operate alongside and in competition with other norms of international law. Claims to rights may conflict with each other, and similarly

⁴² See Horowitz DL, ‘Self-Determination: Politics, Philosophy, and Law’ in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 181-214.

⁴³ Emerson, note 11 above, 475.

⁴⁴ Bowring, note 40 above, 123.

⁴⁵ De George RT, ‘The Myth of the Right of Collective Self-Determination’ in W Twining (ed.), *Issues of Self-Determination* (Aberdeen: Aberdeen University Press, 1991) 1-7, 7. For Crawford, the notion of a ‘people’ may be context-dependent and, indeed, what constitutes a people ‘may be different for the purposes of different rights’: see Crawford, note 10 above, 168-170, especially 170.

⁴⁶ De George, note 45 above, 6. See though particularly the situation regarding Kosovo: sections 6.3.2 and 6.3.3 below.

norms and institutions may also reflect an internal plurality of interests.⁴⁷ In this section consideration is given to the relationship of self-determination to long-standing norms of sovereignty and territorial integrity, for these norms do by their very existence and interpretation qualify and determine the extent of emerging norms of international law.

Sovereignty is inextricably linked to notions of statehood and territorial integrity, and the principle of external self-determination has the ability to compromise the sovereignty and territorial integrity of a nation. Sovereignty itself is a guarantee of the stability of the legal order and has been seen as the '*supreme legitimate authority within a territory*'.⁴⁸ At the same time, the content of the term 'sovereignty' is not subject to universal agreement, although the term is frequently associated with independence.⁴⁹ Indeed, 'sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality'.⁵⁰ It is clear therefore that there is an element of primacy to the principle of sovereignty as an international norm.

The roots of sovereignty are deep, and for more than 400 years 'it has been impossible to talk about sovereignty without also discussing territory',⁵¹ and one point of concurrence is that it is only states that can be sovereign, the state being defined in

⁴⁷ See Kamenka, note 30 above, 127.

⁴⁸ See Groarke, note 19 above, 49, emphasis in original. Sovereignty has been viewed, like law itself, as a presupposition and not as a legal conception. See Twining W, *Globalisation and Legal Theory* (London: Butterworths, 2000) 32, referring to Buckland WW, *Some Reflections on Jurisprudence* (Cambridge: Cambridge University Press, 1945) 68.

⁴⁹ Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition (Philadelphia: University of Pennsylvania Press, 1996) 14-15.

⁵⁰ Brownlie, note 21 above, 287.

⁵¹ Buchanan A and Moore M, 'Introduction: The Making and Unmaking of Boundaries' in A Buchanan and M Moore (eds), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 1-15, 6.

Article 1 of the Montevideo Convention on Rights and Duties of States.⁵²

Accordingly, there is an inherent relationship between sovereignty and the integrity of the state. It is this integrity that self-determination comes up against, for self-determination at its deducible extreme of secession violates the boundaries of the state.⁵³ The fact that actors other than states may be parties involved in issues of self-determination⁵⁴ is a further factor emphasising the tensions between norms of self-determination and sovereignty. States though are always minded to preserve their supremacy, and a recent instance involving China, outlined below, is instructive.

China has shown itself in recent decades to be intent on preserving its territorial boundaries, and indeed on expanding them to incorporate territories previously removed from China, such as Hong Kong and Macao. In March 2005 China went further, and a draft Anti-Secession Law was prepared and, on 14 March, ratified. The Law is aimed specifically at Taiwan and the intention is to ‘provide the legal framework to support Beijing’s opposition to moves by Taiwan to make its *de facto*

⁵² Signed 26 December 1933, 165 LNTS 19. See section 4.2.1 below, and also Hannum, note 49 above, 15-16. By Article 1 a state has to show that it is territorially defined, contains people and governs them, and is able to enter into relations with other states: see James A, *Sovereign Statehood: The Basis of International Society* (London: Allen & Unwin, 1986) 41.

⁵³ In this sense self-determination and secession are interlinked: Galbreath DJ, ‘Dealing with Diversity in International Law: Self-Determination and Statehood’ (2005) 9(4) *International Journal of Human Rights* 539-550, 539-540. However, it is clear that the United Nations does not accept the principle of unilateral secession, and that it respects the territorial integrity of the nation state – see UNGA Resolution 1514 (XV) of 14 December 1960, note 28 above. Yet a colonial territory does have the right to secede, as is evident from UNGA Resolution 2625 (XXV) of 24 October 1970, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which resolution itself also emphasises that ‘The territorial integrity and political independence of the State are inviolable’. The resolution provides, inter alia, that ‘The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination’. There are indeed three possible ways in which a non-self-governing territory ‘can be said to have reached a full measure of government’. These are specified in *Principle VI* of UNGA Resolution 1541 (XV) of 15 December 1960, note 29 above. The three possible ways referred to are: ‘(a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.’ A fourth possibility, the emergence into any other political status freely determined by a people, is specified additionally by Resolution 2625 (XXV) of 24 October 1970.

⁵⁴ See *East Timor (Portugal v Australia)*, note 17 above, and related text.

independence permanent'.⁵⁵ According to Wang Zhaoguo, vice-chairman of the Standing Committee of the Chinese National People's Congress, the intent is that, in the event of possibilities for peaceful reunion of China and Taiwan being exhausted, 'the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity'.⁵⁶ Wang Zhaoguo stresses the fact that resolution of the Taiwan question and accomplishing national reunification 'is an internal affair of China bearing on the fundamental interests of all Chinese people, the Taiwan compatriots included'.⁵⁷ In addition, he makes specific reference to sovereignty and territorial integrity brooking no division. This attitude towards Taiwan is indicative of the dichotomy between self-determination, on the one hand, and sovereignty and territorial integrity, on the other, and also of the position China takes with regard to Tibet, which, unlike Taiwan at the present juncture, is embedded within the Chinese state.

Secession, however, is not the only potential outcome of a successful claim to self-determination, and not all potential outcomes are in direct conflict with the norms of

⁵⁵ Coonan C, 'China fights Taiwan independence with arms and a new law', 5 March 2005 *The Times* 50.

⁵⁶ See People's Daily Online, 'China clarifies conditions for non-peaceful means to stop secession' (2005)

<http://english.peopledaily.com.cn/200503/08/eng20050308_176011.html>, accessed 8 March 2005. It is worth noting, though, the general comment of Qian Qichen, former Vice Premier of China, at the Kyoto Conference that 'History shows that force would not lead to peace, and war could not win popular support': Ministry of Foreign Affairs of the People's Republic of China, 'Stepping up International and Regional Cooperation to Put an End to Armed Conflicts and Remove their Sources' (2004)

<<http://www.fmprc.gov.cn/eng/wjdt/zyjh/t142395.htm>>, accessed 29 March 2006. This remark also resonates in the Tibetan context.

⁵⁷ People's Daily Online, 'Resolving Taiwan question "entirely" internal affair of China: legislator' (2005)

<http://english.peopledaily.com.cn/200503/08/eng20050308_176010.html>, accessed 8 March 2005. Similarly Li Peng, 'Accomplishing the Great Task of the Reunification of the Motherland Is the Common Wish of All Chinese People (January 30, 1996)' (2002) 35(5) *Chinese Law and Government* 18-24, 21. See also Keyuan Zou, 'Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law' (2005) 4(2) *Chinese Journal of International Law* 455-463: particularly the Law is to oppose and prevent Taiwan's secession with a view to preserving the sovereignty and territorial integrity of China (at 457).

sovereignty and territorial integrity.⁵⁸ The right of self-determination inheres to all peoples, but, while there is ‘clear preference for independence as the normal result of exercise of the right to self-determination’,⁵⁹ a result of minority autonomy should be less conflictual with the retention of sovereignty and territorial integrity in situations where secession is impractical.⁶⁰ In this respect the issue of ‘internal’ self-determination becomes relevant, raised particularly in the context of indigenous populations and minorities.

Nor is it the case that self-determination conflicts with all other norms or institutions of international law. The principle is in harmony with the burgeoning human rights doctrines, and indeed it is through deviations in the respect for human rights that peoples may find their route to pursue claims for self-determination.

2.3.3 Links Between Self-Determination and Human Rights

Similar to the theory of self-determination, international protection of human rights is a doctrine that has been formulated in relatively recent years, and previously, for centuries, ‘any ruler would take care in the most appropriate fashion of the fate of his subjects’.⁶¹ Any interventions on the international level were random – for instance in respect of the protection of Christian communities in parts of the Ottoman Empire.⁶²

⁵⁸ Secession, unless consensual, may be defined as ‘the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter’: Kohen MG, ‘Introduction’ in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 1-20, 3. No such right to secede is accepted by the United Nations: see note 53 above.

⁵⁹ Hannum, note 49 above, 40. See also Brownlie I, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague: Martinus Nijhoff Publishers, 1998) 46.

⁶⁰ Norman W, ‘The Ethics of Secession as the Regulation of Secessionist Politics’ in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 34-61, 55.

⁶¹ Tomuschat C, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) 7.

⁶² Such concerns were ‘generated far more by the tangible threat of intervention on behalf of . . . [religious, national or linguistic] minorities by outside States sharing the same religious, national, or linguistic traits than by a felt need to minimize the theoretical justifications for possible secession by

In any event, it was not until the twentieth century that international institutions with the ability to exercise a monitoring function came into existence, initially with the inception of the International Labour Organization in 1919 but principally with the advent of the United Nations Charter in 1945.⁶³

While self-determination is applicable to peoples rather than individuals, and is subject to interpretation, human rights ‘are rights of individuals in society which are regarded as universal and inalienable’.⁶⁴ Universality, though, is a concept in this context that merits discussion, and finds its focus in the different categories of human rights. Human rights in the first category may be termed civil liberties, or ‘negative’ human rights, which limit the power of the state: for example, freedom and security of the individual or freedom of speech. Human rights comprised by the second category are in the nature of economic and social rights – such as the right to work or the right to social security; these are positive demands on an ever-increasing state. A third

such groups. Nevertheless, such early attempts at securing fundamental rights for minorities are significant in that they provided precedents for the much more intensive effort at international protection undertaken during the League of Nations era’: Buchheit, note 7 above, 60.

⁶³ See generally Tomuschat, note 61 above, 6-23. However, solicitude for the welfare of individuals permeated the international system as early as the eighteenth and nineteenth centuries in certain specific respects. The abolition of the slave trade is evidence of this (exemplified by the Slavery Abolition Act 1833), and following the First World War ‘concern for individual human beings was reflected in several League of Nations programmes. Building on earlier precedents in the nineteenth century, the dominant States pressed selected other States to adhere to “minorities treaties” guaranteed by the League . . . The years following the First World War also saw a major development in international concern for individual welfare . . . the International Labour Office (now the International Labour Organisation (ILO)) was established and it launched . . . a series of conventions setting minimum standards for working conditions and related matters’: Henkin L, ‘International Law: Politics, Values and Functions’ (1989) 216 (IV) *Collected Courses of Hague Academy of International Law* 13, 210, quoted in Steiner and Alston, note 19 above, 127-130, 128. After the end of the First World War, provisions for minority protection were included in the peace treaties of some states, such as Austria and Hungary, and other states such as Poland ‘signed minority protection treaties with the allied and associated powers’: Steiner and Alston, *ibid*, 95. See too section 2.2 above. The work of the ILO continues, and, for example, on 27 June 1989 the General Conference of the ILO at its 76th session adopted the Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force on 5 September 1991, and which provided for instance in Article 3: ‘1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples. 2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.’

⁶⁴ Kent A, *Between Freedom and Subsistence: China and Human Rights* (Hong Kong: Oxford University Press, 1993) 6. See though notes 73 and 76 below and section 5.2.1 below.

category of human rights comprises composite rights, such as the rights to peace, to a clean environment, or the right to development.⁶⁵

Christian Tomuschat makes the point that ‘international human rights must be considered an offspring of the human rights that were originally codified at national level’.⁶⁶ This then explains the fact that different states approach the principle of human rights from different angles and give different emphasis to particular human rights over others. In the West, in the history of classical liberalism, it has been the view that human rights should serve the ends of the individual. This is reflected in the philosophical works of such as John Locke (1632-1704) and is made clear by Emmerich de Vattel who, when premising a right of resistance for citizens, wrote:

When a prince, without any apparent reason, attempts to deprive us of life, or of those things, the loss of which would render life irksome, who can dispute our right to resist him? Self-preservation is not only a natural right, but an obligation imposed by nature, and no man can entirely and absolutely renounce it.⁶⁷

The case is somewhat different, though, in socialist states, and human rights in such systems ‘are seen as determined by the state and as having no autonomous existence’.⁶⁸ In China, human rights are viewed as subordinate to state sovereignty

⁶⁵ See Tomuschat, note 61 above, 24; Kent, note 64 above, 7.

⁶⁶ Tomuschat, note 61 above, 25. Further, it must be remembered that ‘International law rules framed in terms of the protection of human rights against state interference are very largely a post-1945 phenomenon. Before then . . . the treatment of nationals was regarded as being within the domestic jurisdiction of sovereign states’: Harris, note 14 above, 654; similarly Tomuschat, *ibid*, 8, with regard to the lack of international institutions capable of exercising monitoring functions prior to the twentieth century; and Douzinas C, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000) 115: ‘Human rights entered the world scene after the Second World War’. See also section 5.1 below.

⁶⁷ De Vattel E, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (ed. J Chitty) (London: Sweet, Stevens & Sons, and Maxwell, 1834) Book I, Chapter IV, §54. See, also, Tomuschat, note 61 above, 11.

⁶⁸ Kent, note 64 above, 13.

and as collectively based: the legal system intervenes ‘on behalf of the collective interest of all individuals, vested in the sovereignty of the state’.⁶⁹ Collective interests of the state, not interests of the individual, are stressed. This reflects Marxist convictions that it is only within the collective interest that individual rights can be fully realised. Further, in China, the understanding of rights is a part of thought that dates back to the late Qing (mid-to-late nineteenth century) and Republican periods of Chinese history and indeed ultimately to Confucianism.⁷⁰ The end purpose is the strengthening of the state,⁷¹ and thus, for China, economic and social human rights take precedence, whereas civil and political human rights are subordinated to state interests. The Chinese perception of the individual is of someone who owes duties to society and the nation: any rights he or she may have are essentially the offspring of those duties.⁷²

It is therefore evident that while the subject of ‘human rights’ is perceived as a universal and rapidly growing doctrine, in fact ‘universality’ is a misnomer, by reason of the fact that fault lines occur within the panoply encompassing human rights.⁷³ This is important when moving on to consider the theory of self-determination, as self-determination has linkages with human rights issues. It is also important specifically

⁶⁹ Ibid 30.

⁷⁰ Weatherley RD, *The Discourse of Human Rights in China: Historical and Ideological Perspectives* (Unpublished PhD Thesis: University of Newcastle upon Tyne, 1997) 211-212, 242.

⁷¹ Kent, note 64 above, 38.

⁷² Weatherley, note 70 above, 107.

⁷³ In contrast to the universality of human rights is the relativist challenge to human rights, based on cultural relativism. See, in this regard, section 5.2.1 below. Nevertheless, cultural relativism may prove to be the means whereby a state maintains its power: see Chapter 5, note 30 below, and also Rosalyn Higgins, who argues that relativism is a state-centred view which ‘loses sight of the fact that human rights are *human* rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned’: Higgins R, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 96-97, quoted in Harris, note 14 above, 656-657 (emphasis in original).

when examining China's view that only states, not individuals, can be subjects of international law.⁷⁴

Just as there is divergence between Western and socialist doctrines of human rights, there is also divergence in respect to self-determination. This has centred around the anti-colonialist force of the principle, where the socialist doctrine became predominant: 'Socialist countries understand self-determination essentially as the liberation of non-self-governing peoples from colonial domination.'⁷⁵ The socialist view has been that self-determination means 'external' self-determination, and not for peoples other than those who are subject to colonial or racist rule or who are under foreign domination. There is emphasis on the idea that only in socialist states can self-determination be completely realised, and in the end 'for sovereign and independent States self-determination becomes tantamount to the right to non-intervention':⁷⁶ i.e. emphasis is placed on territorial integrity. Western states have viewed this perspective as too narrow – and emphasise close links between individual human rights and self-determination, as well as the universality of self-determination. Although socialist doctrine came to the fore in the post-Second World War era, the collapse of the Soviet Union and its satellite empire in 1991 has inevitably provoked a re-evaluation of concepts of self-determination.

It is clear then that a strained relationship may exist, not only between individual states, but also between international law so far as human rights are concerned and national laws based on the perceptions of individual states. Nevertheless, states may

⁷⁴ Kent, note 64 above, 48.

⁷⁵ Cassese, note 30 above, 140.

⁷⁶ Ibid. The right to non-intervention is buttressed by East Asian states' stance in the relativist challenge to human rights and the community/culture-based view that it incorporates. See section 5.2.1 below regarding the 'Asian values' debate and section 5.2.2 regarding the Bangkok Governmental Declaration of 1993.

not derogate from mandatory provisions of international law with reference to the universal protection of human rights, and peremptory norms of international law ‘exist to protect the values and interests that are fundamentally important to the international community as a whole’.⁷⁷

It is plain, however, that tensions have permeated the principle of self-determination, as well as subsisting between the principle and other international legal norms. Accordingly, I shall now turn to an analysis of the theory, in a critical evaluation that examines the theory in light of present-day *realpolitik*.

2.4 Analysis of the Theory

2.4.1 Rule or Principle

It has been a point of disagreement as to whether self-determination is characterised as a principle of international law, or as a rule, or indeed both.⁷⁸ Although the theory has proved to be dynamic in its evolution, as would be expected of a principle, this has not been the product of a flowing momentum, but rather of development by fits and starts, and there have been formulations of the theory as a clear-cut rule. That this is so is evidenced by the history of the theory during the twentieth century, and in particular following affirmation of self-determination as a theory subsequent to the Second World War, when the application of the right of self-determination to

⁷⁷ Orakhelashvili A, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’ (2005) 16(1) *European Journal of International Law* 59-88, 62. See also Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* Judgment of the Court of First Instance of 21 September 2005, para. 231, referring in turn to the Advisory Opinion of the International Court of Justice of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996, 226, para. 79, accessible at <<http://www.icj-cij.org/docket/files/95/7495.pdf>>.

⁷⁸ Knop, note 18 above, 29.

overseas colonies came to be seen as the formulation of a sharply defined rule.⁷⁹ A narrow definition of self-determination precludes in turn ‘any definition of “peoples” broader than colonies’.⁸⁰

Nevertheless, a positivist rule-based theory leaves little room for the dynamism manifest in respect of self-determination in the post-colonial era. Antonio Cassese refers to the drive to transform self-determination from an idea to a legally binding principle and evidences the expansion of the principle as an instrument that in the post-Cold War era has been turned on its creators.⁸¹ The International Court of Justice has clarified the issue and stated in *East Timor (Portugal v Australia)*:

In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, pp.31-32, paras 52-53; *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, pp.31-33, paras 54-59); it is one of the essential principles of contemporary international law.⁸²

⁷⁹ Ibid 30.

⁸⁰ Ibid 54.

⁸¹ In the post-Cold War period, self-determination ‘has come to be seen increasingly as fuelling the currency of ethno-national intolerance, rivalry, tribalism, xenophobia, and worse: a Golem turned on its creators’: Cassese, note 1 above, 4. Thus latterly self-determination has operated against socialist imperialist states: see section 2.4.2 below.

⁸² ICJ Reports 1995, 90, para. 29, Judgment of 30 June. See too Harris, note 14 above, 116-117.

Affirmation of this is found in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁸³ and obligations are placed on all states. In that case, the Court recalled its previous case law emphasising that ‘developments in “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]” . . . [and] that the right of peoples to self-determination is . . . a right *erga omnes*’.⁸⁴

The International Court has been wary of using the terminology of ‘peremptory norm of international law’ (*jus cogens*) and has instead employed ‘virtual synonyms (such as the concept of obligations *erga omnes*)’.⁸⁵ *Jus cogens* norms are peremptory norms and are non-derogable, whereas *erga omnes* rules ‘are rules which, if violated, give rise to a general right of standing – amongst all States subject to those rules – to make claims’.⁸⁶ Thus ‘*jus cogens* rules are necessarily *erga omnes* rules, but . . . *erga omnes* rules could exist which were not of a *jus cogens* character’.⁸⁷ Not all writers view the principle of self-determination as being of a *jus cogens* nature, but such rejection is not universally held.⁸⁸

Jus cogens rules derive ‘from the “process of customary international law”, which is itself part of an international constitutional order’,⁸⁹ and the International Court has in *East Timor (Portugal v Australia)* confirmed the principle of self-determination as

⁸³ Advisory Opinion, ICJ, 9 July 2004; (2004) 43 *International Legal Materials* 1009.

⁸⁴ Advisory Opinion, *ibid*, para. 88. Also, UNGA Resolution 2625 (XXV) of 24 October 1970, note 53 above, affirmed that ‘Every State has the duty to refrain from any forcible action which deprives peoples referred to . . . of their right to self-determination’.

⁸⁵ Crawford J, *The Creation of States in International Law*, Second Edition (Oxford: Clarendon Press, 2006) 101.

⁸⁶ Byers M, ‘Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules’ (1997) 66 *Nordic Journal of International Law* 211-239, 211.

⁸⁷ *Ibid* 212.

⁸⁸ See Harris, note 14 above, 117.

⁸⁹ Byers, note 86 above, 212.

‘one of the essential principles of contemporary international law’.⁹⁰ Thus, even though the Court has been wary to use the term *jus cogens*, writers such as Alexander Orakhelashvili are able to state: ‘The right of peoples to self-determination is undoubtedly a part of *jus cogens*’.⁹¹ This conclusion is logical and the view of the Court in *East Timor (Portugal v Australia)* therefore supports a proposition that self-determination has achieved the status of *jus cogens*, derogation from which is prohibited.

The classification of the theory as a general principle rather than a rule is of importance due to the ‘great normative potential and dynamic force’ of principles.⁹² However, it is larger, external events that have brought about evolution of this principle, rather than a momentum of its own. It was the shock of the First World War that led to its popularity at the time of the 1919-1920 Peace Settlement; the events of the Second World War that led to the inclusion of the principle in the United Nations Charter and its subsequent use in the colonial context; and the collapse of the Soviet empire, leading to the post-Cold War era, that resulted in its further evolution, and it is that evolution that is the subject of the following section.

⁹⁰ ICJ Reports 1995, 90, para. 29, Judgment of 30 June.

⁹¹ Orakhelashvili, note 77 above, 64; referring, for example, to Gros Espiell H, ‘Self-Determination and Jus Cogens’ in A Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn – The Netherlands: Sijthoff & Noordhoff, 1979) 167-173, 170. Orakhelashvili further makes the point that human rights that are non-derogable under treaties such as the ICCPR are peremptory and therefore *jus cogens*: *ibid*, 64-65. See also Cassese, note 1 above, 140, referring to his arguments at 133-140: ‘the conclusion is justified that self-determination constitutes a peremptory norm of international law . . . the whole cluster of legal standards (the general principle and the customary rules) on self-determination should be regarded as belonging to the body of peremptory norms’. James Crawford also indicates that self-determination is a peremptory norm: Crawford, note 85 above, 101 (despite Harris, note 14 above, indicating at 117 that Crawford rejects self-determination as *jus cogens*).

⁹² Cassese, note 1 above, 129. See also sections 2.4.2 and 6.3 below regarding the dynamic force of the theory of self-determination.

2.4.2 Dynamism of the Theory

2.4.2.1 The Soviet Union

Although the idea of sovereignty is still a central part of much thinking in the arena of international relations and international law and plays a part in defining both the status and rights of nation states,⁹³ its primacy has been challenged, particularly in the wake of the break-up of the Soviet Union, and it is in the last two decades that the dynamism inherent within the competing principle of self-determination has become most obvious. Even so, there remains a basic problem within the concept of self-determination, and this attaches to the question of what kind of community it should apply to,⁹⁴ and this in a situation where national self-determination may be perceived as a ‘rather unclear mixture of ideas about cultural identity and individual liberty’.⁹⁵ In analysing the theory of self-determination, therefore, it is pertinent to ask whether the events of recent years shed light on the theory itself, its content and extent.

As the era of decolonisation has drawn to an end, self-determination has sought to find outlets in a variety of ways, to greater or lesser success. The 1991 collapse of the Soviet Union is one example. From the mid-1980s onwards, the peoples of socialist Eastern Europe were seen to reject ‘the dictatorship of the proletariat’⁹⁶ as the democratic process gained ground, and it is the seed of self-determination that spawned the resultant entitlement to democracy.⁹⁷ It has been acknowledged that the

⁹³ Jackson JH, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’ (2000) 97(4) *American Journal of International Law* 782-802, 782.

⁹⁴ Sluga G, ‘What is national self-determination? Nationality and psychology during the apogee of nationalism’ (2005) 11(1) *Nations and Nationalism* 1-20, 1-2.

⁹⁵ Breuilly J, *Nationalism and the State* (Manchester: Manchester University Press, 1982) 373.

⁹⁶ Franck TM, ‘The Emerging Right to Democratic Governance’ (1992) 86(1) *American Journal of International Law* 46-91, 49.

⁹⁷ Ibid 52. The rejection was of the Warsaw Treaty of Friendship, Cooperation and Mutual Assistance of 14 May 1955 (commonly known as the Warsaw Pact) – a defence pact instigated by the Soviet Union following World War II – and of Soviet dominance, both by states peripheral to the Soviet

principle of self-determination 'contributed to the decision by the leaders of the Soviet Union, beginning in 1989, to withdraw their military forces and political suzerainty from Eastern Europe and . . . from the Baltic States'.⁹⁸ This effectively was the commencement of a belated Soviet decolonisation,⁹⁹ and a rebuttal of the subsisting doctrine of self-determination whereby, to benefit from the theory, colonial territories had to be geographically separate from the metropolitan state.¹⁰⁰

It was not just states within the Soviet ambit that were able to separate themselves from the so-called Eastern Bloc, but also states integral to the Soviet Union itself, such as the Ukraine, Kazakhstan, Georgia and the Baltic States. The Soviet Government tried to stave off the assertion of nationality rights, and bring about a greater democracy to the Soviet system, by several amendments to the constitution in 1988.¹⁰¹ However, territories such as the Baltic States severed direct connections with Moscow, and altered their relationship with what had been the parent state. The situation is ongoing, from the insurgents of Chechnya to the revolutionary upheavals in the Ukraine and Moldova in 2004 and 2005.¹⁰² Self-determination extended its reach into the USSR, but in so doing there has been increased instability in the area,

Union but within the Warsaw Pact and by states within the Soviet Union itself. The Warsaw Pact eventually terminated on 1 July 1991.

⁹⁸ Ibid 55, the Baltic States comprising Estonia, Latvia and Lithuania. The withdrawal of the Soviet Union from Eastern Europe followed demands for democratic reforms and revolt in 1989 in states such as East Germany, where the Communist Party collapsed leading ultimately to unification with West Germany in 1990, Bulgaria, where a multi-party system replaced the Communist authoritarian rule of Todor Zhivkov at the end of 1989, Romania, where the Communist Government of Nicolae Ceaucescu was overthrown, and Ceaucescu executed, in December 1989, and Czechoslovakia where, in the same month, the democratic government of Vaclav Havel was elected following public demonstrations and the resignation of the Communist leaders.

⁹⁹ Reisman WM, 'International Law after the Cold War' (1990) 84(4) *American Journal of International Law* 859-866, 864.

¹⁰⁰ It is, though, the case that the Soviet Union consented to its own break-up, and a right to self-determination for its constituent republics was enshrined in the Soviet Constitution: see the Constitution of the Soviet Union, adopted on 7 October 1977, Article 72.

¹⁰¹ Hannum, note 49 above, 365-366, 1988 constitutional amendments, for example, altering the electoral and political systems in place.

¹⁰² It is noteworthy that Chechnya has not been able to achieve self-determination. Article 72 of the Soviet Constitution, note 100 above, referred to the right of each union republic to secede from the USSR, and Chechnya was not such a republic, being a constituent part of Russia.

and sphere of influence, of the former Soviet Union, emphasising the fluidity of political and legal identity and the potentially destructive impact of self-determination on territorial integrity and the inviolability of state boundaries.

Self-determination in the form of consensual secession has determined the outcome of the collapse of the Soviet power. However, in a sense the secession is incomplete, although highlighting ethnic nationalism and conflicting with notions of statehood and territorial integrity. There is ever-increasing interdependence of states, and the states that have seceded from the Soviet Union are still linked, in particular economically, with the Russia of the present.¹⁰³ This can be seen, for instance, with regard to arguments raging at the end of 2004 and early in 2005 in the Ukraine with reference to the benefits or otherwise of retaining close links with Russia – or indeed pursuing closer ties with the European Union – and is indicative of an age of ‘porous borders and intertwined economies and cultures’.¹⁰⁴ The Soviet example of self-determination through secession of constituent republics, though, evidences the consensual separation of states from an imperial bloc and should not be taken further as evidence leading to the disintegration of multinational states along national or ethnic lines.¹⁰⁵

¹⁰³ This point was given particular emphasis in December 2005 and January 2006, when Gazprom, the Russian state-controlled natural gas monopoly, halted gas deliveries to the Ukraine after the Ukraine Government refused to pay quadruple the price it had previously paid for Russian gas, Russian gas accounting for approximately a third of Ukraine’s gas consumption. Ukraine accused Russia of trying to undermine its economy. The dispute was compounded by the fact that Ukraine acted as a transit country for much of the Russian gas flow to Europe. See generally, for example, Associated Press (The), ‘Europe feels effect of Russia-Ukraine gas fight: Austria, Hungary say supply cut after Kiev refuses Moscow’s price rise’ (2006)

<<http://www.msnbc.msn.com/id/10673855>>, accessed 13 September 2006. Similarly regarding Ukrainian accusations in May 2005 of Russian oil companies trying to ‘bully’ the Ukraine by causing fuel shortages: BBC News, ‘Ukraine raps Russia oil “bullies”’ (2005)

<<http://news.bbc.co.uk/1/hi/business/4552349.stm>>, accessed 13 September 2006.

¹⁰⁴ Talbott S, ‘Self-Determination in an Interdependent World’ (2000) *Foreign Policy* 152-163, 156.

¹⁰⁵ See Brownlie, note 59 above, 44-47. Further, Chechnya, a federal unit within Russia, has been unable to secede from the Russian Federation following the break-up of the Soviet Union, and has been unsuccessful in obtaining support for secession from nation states; see note 102 above.

2.4.2.2 Eastern Europe

The break-up of the Soviet Union shows the truth of the comment that self-determination is likely to be a harbinger of ‘discontent, disorder and rebellion’,¹⁰⁶ and this is again highlighted in the context of the former Yugoslavia. While such dissolution of the Soviet Union as has taken place was based on agreement of the constituent parts of the state, this was not the case in Yugoslavia. Declarations of independence came from Slovenia and Croatia in June 1991, and ultimately the state broke up into constituent parts in a surge of violence and what came to be known as ‘ethnic cleansing’.¹⁰⁷ The trauma was such that the International Criminal Tribunal for the Former Yugoslavia (ICTY), set up in 1993, still sits some fourteen years later, establishing facts and bringing to accountability those involved in war crimes within the scope of its remit.¹⁰⁸

Despite the break-up of the former Yugoslavia, issues of territorial integrity were not without relevance. The artificiality of post-colonial boundaries has previously been

¹⁰⁶ See Talbott, note 104 above, 153; quoting Robert Lansing, Secretary of State to Woodrow Wilson.

¹⁰⁷ See Hannum, note 49 above, 497-498, and De Lange R, ‘Paradoxes of European Citizenship’ in P Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law* (Aldershot: Dartmouth Publishing Company Limited, 1995) 97-115, 101.

¹⁰⁸ Charges brought in front of the ICTY include those in respect of ethnic cleansing. See, for example, the Indictment brought on 4 March 2004 by the Prosecutor of the Tribunal against Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Covic, and Berislav Pusic (IT-04-74-PT), which at paragraph 15 outlined the joint criminal enterprise, inter alia: ‘to politically and militarily subjugate, permanently remove and ethnically cleanse Bosnian Muslims and other non-Croats who lived in areas on the Territory of the Republic of Bosnia and Herzegovina . . . and to join these areas as part of a “Greater Croatia,” . . . by force, fear or threat of force, persecution, imprisonment and detention, forcible transfer and deportation, appropriation and destruction of property and other means . . . It was part of the joint criminal enterprise to engineer the political and ethnic map of these areas so that they would be Croat-dominated, both politically and demographically’ (unaffected by the Amended Indictment of 16 November 2005). See the website of the ICTY: for the Indictment specifically, see <<http://www.un.org/icty/indictment/english/prl-ii040304e.htm>>. Ethnic cleansing leads to displacement of population by measures such as those alleged in the Indictment mentioned: see Kaldor M, ‘Transnational civil society’ in T Dunne and NJ Wheeler (eds) *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999) 195-213, 204-206; Balkan, ‘View from The Hague: They Allegedly Carried Out the Ethnic Cleansing Plan’ (2004) <<http://www.un.org/icty/bhs/outreach/articles/eng/article-040407e.htm>>. The existence itself of the Tribunal, which ‘has expanded the boundaries of international humanitarian and international criminal law’ (website of the ICTY – ‘The ICTY at a Glance, point 4. <<http://www.un.org/icty/glance-e/index.htm>>), is a challenge to the idea of state sovereignty.

referred to: where decolonisation applied, national colonial boundaries prevailed.¹⁰⁹ This thinking persisted in Yugoslavia, ‘where all of the Western states decided from 1991 that the former internal borders of constituent republics would remain sacrosanct’.¹¹⁰ This has been emphasised by the ICTY, and referred to on the basis that ‘a liberal rule legitimating secession of constituent federal units is matched by a strict prohibition on any further territorial change’,¹¹¹ i.e. the right to secede, based on self-determination, is applied only to those inhabiting a federal unit whose territorial limits had previously been defined by an autonomous government and administration.¹¹² The effect of this exacerbates ethnic cleansing, and brings to the fore new ethnic minorities within newly created states as ethnic nationalism increases in visibility. A potential outcome of self-determination is thus to create new demands for self-determination from new minorities, new problems,¹¹³ but there has been

¹⁰⁹ See note 28 above. The artificiality of post-colonial boundaries has been particularly acute in Africa, and the different ethnic groups within the distinct countries on the African continent, and has sown seeds of division, exemplifying the conflict between self-determination and the principle of *uti possidetis*. See, for example, the genocidal conflict in Rwanda and Burundi in 1993-1994 and also Sudan: Hannum, note 49 above, 493-494. See in this context also the African Charter on Human and People’s Rights, which in Article 20 sets out a right to self-determination of all ‘peoples’, and provides, in paragraph 2 thereof, that ‘Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community’: African Charter on Human and People’s Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU doc CAB/LEG/67/3. Also see Charter of the Organization of African Unity, 479 UNTS 39, entered into force 13 September 1963, Article III of which refers to the sovereign equality of the member states, the principle of non-interference in the internal affairs of states, and respect for the sovereignty and territorial integrity of each state and ‘for its inalienable right to independent existence’, affirming the concept of *uti possidetis* ‘as a basis for determining boundaries’: Brown-John C Lloyd, ‘Self-Determination and Separation’, September 1997 *Options Politique* 40-43, 42. Continuing internal conflict within states has implications so far as economic progress is concerned, leading to stalled economic initiatives, low gross domestic product, and poor, even decreasing, life expectancy: see in this respect Denham ME and Lombardi MO, ‘Perspectives on Third-World Sovereignty: Problems with(out) Borders’ in ME Denham and MO Lombardi (eds), *Perspectives on Third-World Sovereignty: The Postmodern Paradox* (Basingstoke: Macmillan Press Ltd, 1996) 1-12, 6-7 – the acceptance of colonial borders that has promoted conflict.

¹¹⁰ Hurrell A, ‘International Law and the Making and Unmaking of Boundaries’ in A Buchanan and M Moore (eds), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 275-297, 293.

¹¹¹ Horowitz, note 42 above, 193.

¹¹² This emphasises what was previously thought to be good international law – exemplified by Weller M, ‘The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia’ (1992) 86(3) *American Journal of International Law* 569-607, 606. See now though the question of supervised statehood with respect to Kosovo: section 6.3.3 below.

¹¹³ See Margalit and Raz, note 27 above, 458.

consensus that such minorities should have no right to external self-determination. This in turn reflects ‘the powerful impulse towards stable frontiers and the finality of borders’ and the primacy of the territoriality of states.¹¹⁴ Yet it is arguable that the support at the outset from international states and international organisations for retaining the original territorial integrity of the Yugoslav federation in 1991 strengthened the inflexibility of Slobodan Milosevic, the late Serbian President of Yugoslavia, and directly contributed to the violent and bloody aftermath of the Balkan war.¹¹⁵

The sovereignty and territorial integrity of the Federal Republic of Yugoslavia were emphasised as late as 1999 by the UN Security Council.¹¹⁶ However, there is further validation of the contention for secession in the instance of Kosovo, a province of the former Yugoslavia. By Security Council Resolution 1244 (1999),¹¹⁷ the Federal Republic of Yugoslavia was forced to withdraw its military, police and paramilitary forces from Kosovo¹¹⁸ in the face of violence against and repression of the Kosovan population. The United Nations Interim Administration Mission in Kosovo (UNMIK) and the NATO-led KFOR (Kosovo Force) assumed responsibility for the administration of Kosovo to the exclusion of the Yugoslav authorities,¹¹⁹ while

¹¹⁴ Hurrell, note 110 above, 293, and also 283.

¹¹⁵ See Weller, note 112 above, 570.

¹¹⁶ See UNSC Resolution 1244 (1999) on the situation relating to Kosovo, adopted by the Security Council at its 4011th meeting on 10 June 1999, and see also the statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999, incorporated therein as Annex 1. Similarly, UNSC Resolution 1272 (1999) emphasised the sovereignty and territorial integrity of Indonesia in establishing a United Nations Transitional Administration for East Timor: Yannis A, ‘The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics’ (2002) 13(5) *European Journal of International Law* 1037-1052, 1048.

¹¹⁷ This is a Chapter VII resolution and therefore mandatory.

¹¹⁸ Point 3 of Resolution 1244.

¹¹⁹ Point 11 of Resolution 1244, and see Yannis, note 116 above, 1047-1048. By point 10 of Resolution 1244, an international civil presence was established ‘in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide a transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a

stipulating that the international civil presence would promote ‘the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo’.¹²⁰ Self-determination, without being mentioned, ‘permeates the entire texture of the resolution . . . [which] can be deemed to constitute the first formalized decision of the international community recognizing that a human community within a sovereign State may under specific circumstances enjoy a right of self-determination’.¹²¹

While the Yugoslav situation is indicative of the disintegrative potential of the theory of self-determination, not all recent instances of partition of states have been so violent and disruptive. Czechoslovakia is a case in point, the state dividing along consensually ethnic lines into the Czech and the Slovak Republics.¹²² Following July 1992 elections in Czechoslovakia, the likelihood of dissolution increased and came to the fore as disagreement intensified between the two constituent republics. The political leaders negotiated details for disbanding the federation and parliament voted to dissolve the country on 31 December 1992. By the end of 1992, definitive constitutions had been approved for both the individual Czech and Slovak Republics,¹²³ and on 1 January 1993 each state became peacefully independent of the other in what was known as the ‘Velvet Divorce’.

peaceful and normal life for all inhabitants of Kosovo’. See Chapter 6, note 87, on the question of democratic institutions.

¹²⁰ Point 11 of Resolution 1244.

¹²¹ Tomuschat C, ‘Secession and self-determination’ in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 23-45, 34. Recent developments in respect of Kosovo are considered and analysed in detail in sections 6.3.2 and 6.3.3 below.

¹²² Hannum, note 49 above, 495 and 497.

¹²³ Stein E, ‘International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?’ (1994) 88(3) *American Journal of International Law* 427-450, 440-443.

2.4.2.3 An Ongoing Process

The illustrations referred to above all emanate from Eastern Europe. Nevertheless, around the remainder of the world the principle of self-determination has not been quiescent. It has arisen in various countries, but largely to limited effect. However, the number of instances in which the principle is pleaded leads to the conclusion that it is gaining in force.

One case where self-determination has been achieved is East Timor, which, as long ago as 1960, had been placed on the international agenda by the UN General Assembly when it was published on the list of Non-Self-Governing Territories. East Timor was at that time a Portuguese colony.¹²⁴ In 1974, there was civil war over the question of whether there should be independence for East Timor or integration into Indonesia. Portugal was unable to control developments, withdrew, and in 1975 Indonesia invaded and subsequently annexed the territory.¹²⁵ The occupation was illegal, but it was not until 1999 that the UN Security Council took decisive action in Resolution 1272 (1999)¹²⁶ – establishing the United Nations Transitional Administration for East Timor, ‘with a mandate to prepare East Timor for independence’.¹²⁷ This followed violence subsequent to an East Timorese referendum that rejected autonomy within Indonesia. The UN peacekeeping operation took effect, and, following a further referendum in August 2001, East Timor finally achieved

¹²⁴ See UNGA Resolution 1542 (XV) of 15 December 1960, Transmission of information under Article 73 e of the Charter: paragraph 1(i) referring to ‘Timor and dependencies’. Tibet has not been placed on the international agenda by the UN General Assembly in the same fashion: see section 3.4.3 below.

¹²⁵ See Ball D, ‘Silent witness: Australian intelligence and East Timor’ (2001) 14(1) *Pacific Review* 35-62; Leaver R, ‘Introduction: Australia, East Timor and Indonesia’ (2001) 14(1) *Pacific Review* 1-14; and UNMISET [United Nations Mission of Support in East Timor], ‘Background’ (2005) <<http://www.un.org/Depts/dpko/missions/unmiset/background.html>>, accessed 15 March 2005.

¹²⁶ Resolution dated 25 October 1999 on the situation in East Timor; see (2000) 39 *International Legal Materials* 240-242.

¹²⁷ Brownlie, note 21 above, 60.

independence in 2002.¹²⁸ Self-determination was attained, therefore, for East Timor, but the process was long drawn-out, epitomised by violent struggle and militia attacks,¹²⁹ and, notably, it was in respect of what could be defined as a recognised territory.¹³⁰

A different scenario persists in respect of the Kurds residing in the mountains connecting Turkey, Iraq, and Iran, a region where Kurdish culture has remained dominant despite severe repression. The area 'has been referred to as Kurdistan since the early thirteenth century'¹³¹ and is a distinct entity. The idea of self-determination for the Kurds is not new, and was promoted by President Woodrow Wilson at the end of the First World War. Subsequently, however, this did not materialise: Turkish policy, for example, was to assimilate Kurds into Turkish society, and in Iraq chemical weapons were deployed against Kurds.¹³² The Kurdish issue is complex. The Kurds inhabit three states in which there are pro-Kurd movements and are said to be perhaps 'the largest geographically separate community in the world not to have achieved either statehood or some form of territorial autonomy'.¹³³ However, they lack unity in that, for example, they are not one ethnic group, do not speak one

¹²⁸ See UNMISSET, note 125 above.

¹²⁹ See Candio P and Bleiker R, 'Peacebuilding in East Timor' (2001) 14(1) *Pacific Review* 63-84.

¹³⁰ See also note 112 above and related text.

¹³¹ Hannum, note 49 above, 178.

¹³² See Plunk RL, *Self-Determination of Peoples: Tibet and Kurdistan* (Unpublished LLM Thesis: George Washington University, 1993) 47-60. In August 2006, Saddam Hussein went on trial in Baghdad in connection with an anti-Kurdish offensive in 1987-1988, charged with genocide and crimes against humanity. As many as 180,000 people are said to have been killed in 'Operation Anfal', an offensive during which chemical weapons were used. See, for example, Associated Press (The), 'Saddam Hussein's Genocide Trial Resumes' (2006) <<http://www.abcnews.go.com/International/print?id=2418325>>, accessed 13 September 2006; and BBC News, 'No Saddam plea at genocide trial' (2006) <http://news.bbc.co.uk/1/hi/world/middle_east/5268900.stm>, accessed 13 September 2006. The trial was not concluded due to the execution of Saddam Hussein on 30 December 2006 following conviction on earlier charges relating to mass executions at Dujail 'in the aftermath of an attempt on his life' in July 1982: Keesing's Record of World Events, 'Imposition of death sentence on Saddam Hussein' (2006)

Accessible at <<http://keesings.com>>.

¹³³ Hannum, note 49 above, 199.

language, and are riven by internal argument.¹³⁴ Yet had the major powers taken a stronger line pursuant to the aftermath of the First World War it would have been possible to create a viable Kurdistan.¹³⁵ This is strong evidence of the fact that self-determination, while treated as a legal theory and evolving principle, is subject to the vagaries of the political world. The Kurdish situation itself resonates in discussion of and in comparison with the Tibetan situation, and also in the context of the debate between choice theorists and remedial right theorists, which is referred to below.¹³⁶ It emphasises the importance that commitment of major powers to a cause may have, and brings into the equation the extent to which a state's policy may or may not be interventionist.

2.4.2.4 The Move Towards Internal Self-Determination

A further scenario to be considered in the context of the gathering momentum of the principle of self-determination relates to indigenous peoples. While external self-determination was the original focus of the principle, there has been a movement in recent years towards an emphasis on internal self-determination.

It has been seen that there are restrictions on external self-determination, particularly in the fact that international law has not recognised any formal right to secede – to do so would conflict with established legal norms of statehood and territorial integrity – and also in the limited scenarios in which self-determination has had application. This has led to a distinction that seeks to guarantee internal rather than external self-determination.

¹³⁴ Ibid.

¹³⁵ Ibid 200.

¹³⁶ See sections 2.4.3 and 6.2.

The impetus for internal self-determination reflects the unwillingness of a state to divest itself of sovereignty of a part of its territory, and a desire to give a minority in a state some authority or autonomy over its own affairs.¹³⁷ Thus internal self-determination comprises an ongoing, not a once-and-for-all, right.¹³⁸ Commentators such as Antonio Cassese have seen the internal dimension of self-determination as neglected, and believe it may provide the means for a meaningful autonomy, enabling a minority group to obtain the protection it seeks.¹³⁹

There is a further potential benefit in respect of internal self-determination, when considering the nature of the peoples who are to benefit. So far as external self-determination is concerned, this is perceived in any event to be limited to recognised administrative territories,¹⁴⁰ whereas this is not so with internal self-determination. This is clear from the cases that have been brought by indigenous groups, or members of indigenous groups, and is indicative of the expanding subjects of international law. There are, though, limitations even in this context, as it is a right of peoples not of individuals.¹⁴¹

Article 3 of the Draft Declaration on the Rights of Indigenous Peoples, adopted in 1994,¹⁴² provides that indigenous peoples have the right to self-determination,

¹³⁷ See Groarke, note 19 above, 84; see also Cassese, note 1 above, 350.

¹³⁸ Cassese, note 1 above, 101.

¹³⁹ Ibid 63; 350-352.

¹⁴⁰ See note 112 above and related text, subject to recent potential developments in Kosovo.

¹⁴¹ See Brownlie, note 59 above, 43; and see *Ominayak and the Lubicon Lake Band v Canada* (1994) 96 *International Law Reports* 667.

¹⁴² (1995) 34 *International Legal Materials* 546. The Draft Declaration remains pending, although on 29 June 2006, by Resolution 2006/2, the Human Rights Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples and recommended that the Declaration be adopted by the UN General Assembly. China voted in favour of the adoption in the Human Rights Council. While the Declaration is not yet legally binding, even so it reveals the will of states to incorporate such principles in normative terms and as a result may have persuasive value.

although this right is couched in vague terms.¹⁴³ This follows attempts since the early 1970s in a number of states to deal with claims of indigenous peoples, and some national legal systems, such as those of Canada and Australia, ‘have begun to come to terms with the notion that a “people” may have rights as distinct from the rights of individuals and the rights of the total community’.¹⁴⁴ A point of significance in respect of the Draft Declaration is that indigenous peoples took part in the Working Group formulating the Draft. These participants were outsiders not only to normative international law but also to the institutional system of states.¹⁴⁵ This then leads to a role for indigenous groups in the principle of self-determination and links to the judgment in *East Timor (Portugal v Australia)*¹⁴⁶ in respect of the extension of participants in the field of international law beyond states, that extension acting as a potential brake on the power of states.

Although for indigenous peoples secession from the state has proved elusive, and indigenous rights fall short of sovereign rights,¹⁴⁷ internal self-determination through autonomy is proving a more realistic goal. In Canada there has been recognition of indigenous peoples as ‘legitimate constitutional actors’ and ‘aboriginal rights’ have been recognised in Canadian courts.¹⁴⁸ In Australia indigenous inhabitants have successfully brought court action, for instance claiming land under a pre-colonial title

¹⁴³ See Brownlie, note 59 above, 48; also Tomuschat, note 121 above, 37. Article 3 states: ‘Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’

¹⁴⁴ Nettheim, note 38 above, 126.

¹⁴⁵ Knop, note 18 above, 213-214.

¹⁴⁶ See note 17 above and related text.

¹⁴⁷ See Curry S, *Indigenous Sovereignty and the Democratic Project* (Aldershot: Ashgate Publishing Limited, 2004) 82.

¹⁴⁸ *Ibid* 160; see also *St Catherine’s Milling Co v R* (1888) 14 App Cas 46; *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145; *R v Sparrow* [1990] 1 SCR 1075; and *Delgamuukw v British Columbia* [1997] 3 SCR 1010. Also, the Nisga’a treaty process and rights of self-government granted to the Inuit over the new territory of Nunavut: see <<http://www.nisgaalisims.ca>> and <<http://www.inac.gc.ca/nunavut/index.html>> respectively.

and invalidating Crown Title.¹⁴⁹ Nevertheless the approach differs in Canada and Australia: in the former indigenous peoples are considered self-governing for certain purposes, and in the latter ‘certain special services or programs [are provided] for indigenous groups within an overall context of legal equality’.¹⁵⁰ Even so, by attaining land rights Australian aboriginals can be seen to make progress in the sphere of self-determination, by enabling themselves to have full control over the use of that land in pursuit of economic, social and cultural development and continuation. Self-determination is not therefore equated solely with demand for independence and secession and this may in turn lead to greater potential for resolution of claims by minorities. For indigenous groups, internal self-determination may be more significant than external self-determination.¹⁵¹

A prime example of self-determination through internal autonomy is in respect of the indigenous Saami population of Norway, Sweden, and Finland. Indigenous Saami parliaments now exist in all three countries, and these are essentially indigenously elected departments of the respective state governments. In Norway, the constitution has been amended to provide that the Norwegian state has the responsibility ‘to create conditions enabling the Saami to preserve and develop its language, culture and way of life’.¹⁵² While the powers of the Saami participants are limited, the indigenous communities concerned regard the very creation of the parliaments as a significant development.¹⁵³

There is thus evidence indicative of evolving boundaries to the international legal theory of self-determination; the concept developing from one relating to external

¹⁴⁹ See *Mabo and others v Queensland (2)* (1992) 175 CLR 1, and Curry, note 147 above, 58.

¹⁵⁰ Hannum, note 49 above, 80.

¹⁵¹ Ibid 96-97.

¹⁵² Ibid 489.

¹⁵³ Ibid 247-262, 489-490.

self-determination to one incorporating doctrines of internal autonomy, as well as expanding out of the context of decolonisation. Around these developments two distinct schools permeate the current discourse on self-determination.

2.4.3 Choice Theorists and Remedial Right Theorists

These two schools of thought are prevalent in the modern philosophical debate on self-determination, and can be exemplified by Daniel Philpott, on the part of choice theorists, and by Allen Buchanan and Christian Tomuschat, on the part of remedial right theorists.

The contention of choice theorists is that, if a majority in a territory express their will to secede by referendum or plebiscite, then secession will be legitimate. There is no requirement for the group seceding to show that they are culturally distinct, that they have been subject to injustices, or indeed that they have any particular claim to the territory to which they lay claim. A close relation between democracy and the right to secede exists here, and this explains the view evidenced by Philpott of self-determination as ‘a legal arrangement that gives a group independent statehood or expanded powers within a federal state’.¹⁵⁴ The simple choice ‘by a majority within a seceding region is sufficient to justify their right to secede and the duty of the state (and other states) to allow them to secede on fair terms (i.e. with compensation for state properties, etc, where appropriate)’.¹⁵⁵ Philpott stresses the fact that, mostly, self-determination will lead to an enhancement of federal privileges, while secession will be a last resort,¹⁵⁶ and internal self-determination is thus seen as of relevance to

¹⁵⁴ Philpott D, ‘Self-Determination in Practice’ in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 79-102, 81 and generally that chapter; see also Moore, note 35 above, especially 5 and 10.

¹⁵⁵ Norman, note 60 above, 37.

¹⁵⁶ Philpott, note 154 above, 86.

proponents of this argument. Yet if the choice theorist school of thought is to prevail its inevitable outcome is an increase in the number of states populating the world; an attendant increase in minorities, as any heterogeneous new state will contain its own minorities; potential increase in the movement of peoples as they seek escape from or entry to a state; and increased fluidity of political and legal identity.¹⁵⁷

The arguments of choice theorists evidence a high degree of idealism in what has been termed a 'permissive principle of self-determination'.¹⁵⁸ The remedial right, or just cause, theorists stress, rather than the autonomy-based arguments of choice theorists, the legitimacy of self-determination only if it is required to remedy an injustice. Different kinds of injustice may be focused upon: prior occupation and seizure of territory, for example, or serious violations of human rights, although for some remedial right theorists discriminatory justice is 'sufficient to legitimate secession'.¹⁵⁹ There is consequently a higher burden of proof imposed by the remedial right theorists, even though morality plays a part, as it does in respect of the idealism of the choice theorists.¹⁶⁰

The group seeking to secede is essentially seeking to portray itself as a victim, in the sense that it can show evidence of one or more of the following:

- (i) that it has been the victim of systematic discrimination or exploitation and that this situation will not end as long as the group remains in the state; (ii) that the group and its territory were illegally incorporated into the state within recent-enough memory; (iii) that the group has a valid claim to the territory it

¹⁵⁷ Nevertheless, Wayne Norman makes the point that 'Choice theories are, in effect, nationalist theories shorn of the moral complications of ethnicity' (Norman, note 60 above, 37), and yet 'every serious secessionist movement [in the twentieth century] has involved ethno-cultural minorities' (38).

¹⁵⁸ Moore, note 35 above, 11.

¹⁵⁹ Ibid 6.

¹⁶⁰ See, for example, Buchanan A, 'The Morality of Secession' in W Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 350-374.

wants to withdraw from the state; (iv) that the group's culture is imperilled unless it gains access to all the powers of the sovereign state; (v) that the group finds its constitutional rights grossly and systematically ignored by the central government or the supreme court.¹⁶¹

The impacts relevant in regard to choice theorists, referred to above, may also apply in connection with just cause scenarios. When considering the Sino-Tibetan relationship both theories will prove of relevance, and an in-depth analysis of these theories, and their potential and significance, will be required.¹⁶²

2.5 Concluding Remarks

This chapter has explored central issues and conflicts attributable to the legal theory of self-determination. While self-determination has 'long lingered in the shadow of state sovereignty',¹⁶³ and has been subject to limitations accordingly, it is emerging out of that shadow, and establishing a powerful position in its own right. Hence its boundaries are evolving, and as a norm of public international law it has the potential to impinge on the Sino-Tibetan situation where other norms have failed.

I have made clear in this chapter that the theory contributes to the fluidity of political and legal identity and equally that it has not succeeded in stemming the physical movement of peoples. This is evidenced by various facts: population transfer and exchange following the First World War; that units of self-determination may be manipulated by altering the balance of a population, for instance by population movement from Turkey into Cyprus and from China into Tibet; that self-determination may lead to ethnic flows, for example between states arising from the

¹⁶¹ Norman, note 60 above, 41.

¹⁶² See section 6.2 below.

¹⁶³ Philpott, note 154 above, 86.

former Yugoslavia; that minorities may have to flee persecution in situations where they are unsuccessful in achieving self-determination. The break-up of the Soviet Union further illustrates the fluidity of political and legal identity, as does the increased visibility of internal, as opposed to external, self-determination.

International legal norms of sovereignty and territorial integrity are continuously, and increasingly, being challenged by an international legal norm of self-determination, established as a dynamic principle of public international law, and, while the borders of that norm are subject to change as the theory evolves, the analysis presented in this chapter is evidence of the fact that a framework of the legal theory of self-determination is in place potentially to challenge present Chinese hegemony over Tibet.¹⁶⁴ Yet, more than fifty years after the Chinese invasion, or liberation, of Tibet,¹⁶⁵ that domination remains recognised and ‘generally supported by the world community’, despite violations of international human rights standards perpetrated by the Chinese state.¹⁶⁶ Thus, for the Tibetans, self-determination has to date failed to bring about the freedom they seek, and to consider why this is the case it is necessary

¹⁶⁴ In Chapter 6 of this thesis I shall focus further on the effects of the evolving boundaries of self-determination, considering key issues of the subject in greater depth, with reference specifically to Tibet. The significance of the ongoing debate between choice theorists and remedial right theorists will be analysed in the context of the Sino-Tibetan relationship, and the dynamism of the theory in the 21st century, opening up space for ideas and evolution, will be seen to be of especial importance. While it is pertinent to recall that, at this time, in the view of the UN General Assembly, ‘external self-determination as a right to establish an independent State does not exist for ethnic communities which constitute integral elements of a sovereign State and are thus able to take part in the conduct of public affairs of that State. Legal doctrine overwhelmingly supports this view’ (Tomuschat, note 121 above, 37), the manner in which the evolving theory may impact on sovereignty is significant and thus the new progression in regard to the theory will be emphasised, through concepts both of internal and external self-determination.

¹⁶⁵ On the divergence of views between ‘invasion’ and ‘liberation’ see, for example, Alexandrowicz-Alexander CH, ‘The Legal Position of Tibet’ (1954) 48(2) *American Journal of International Law* 265-274; Tieh-Tseng Li, ‘The Legal Position of Tibet’ (1956) 50(2) *American Journal of International Law* 394-404; van Walt van Praag MC, *The Status of Tibet: History, Rights, and Prospects in International Law* (London: Wisdom Publications, 1987) Chapter 9; see also the Agreement on Measures for the Peaceful Liberation of Tibet dated 23 May 1951, referred to in Tieh-Tseng Li and van Walt van Praag, and also Information Office of the State Council of the People’s Republic of China, ‘Tibet – Its Ownership and Human Rights Situation’, available at <<http://www.china.org.cn/e-white/tibet/index.htm>>, Part One.

¹⁶⁶ Little D, ‘Religion and Self-Determination’ in D Clark and R Williamson (eds), *Self-Determination: International Perspectives* (Basingstoke and London: Macmillan Press Ltd, 1996) 141-154, 149.

to delve more deeply into the relationship that has subsisted between China and Tibet,
a subject to which I turn in the next chapter.

3 The Changing Identity of Tibet

3.1 Introduction

The relationship between China and Tibet is one of marked ambiguity, both historically¹ and continuing to the present day. The defining event in this relationship is the autumn of 1951 when Chinese troops entered Lhasa, marking the end of what at that time was de facto an independent Tibetan polity.² Ambiguity persists some fifty years later as talks take place between Chinese and Tibetan delegations: Chinese Assistant Foreign Minister Shen Guofang describing talks in 2004 as ‘useful and beneficial’, yet a spokesperson for the Chinese Ministry of Foreign Affairs accusing the Dalai Lama of engaging in ‘splittist activities’.³

The purpose of this chapter is to examine the modern history of Tibet, looking into the ongoing relationship between Tibet and China from the various perspectives. Its focus will lead up to and include the seminal events of 1951 and the situation pertaining at that time, together with their aftermath.

¹ See Addy P, ‘British and Indian Strategic Perceptions of Tibet’ in R Barnett and S Akiner (eds), *Resistance and Reform in Tibet* (London: Hurst & Company, 1994) 15-50, 16-17.

² Goldstein MC, *A History of Modern Tibet, 1913-1951: The Demise of the Lamaist State* (Berkeley and Los Angeles, CA: University of California Press, 1989) 813: ‘In the next few months, several thousand troops of the People’s Liberation Army arrived in Lhasa; although the old system continued to exist in some form for another eight years, October 1951 marks the end of the de facto independent Lamaist State.’ Also Goldstein MC, ‘Change, Conflict and Continuity among a Community of Nomadic Pastoralists: A Case Study from Western Tibet, 1950-1990’ in R Barnett and S Akiner (eds), *Resistance and Reform in Tibet* (London: Hurst & Company, 1994) 76-111, 92.

³ US Department of State, ‘Report on Tibet Negotiations’ (April 2005) <<http://www.state.gov/p/eap/rls/rpt/45015.htm>>, accessed 14 July 2005. ‘Splittist’ is a word used by the Chinese authorities when referring to Tibetan separatists: Schwartz RD, ‘The Anti-Splittist Campaign and Tibetan Political Consciousness’ in R Barnett and S Akiner (eds), *Resistance and Reform in Tibet* (London: Hurst & Company, 1994) 207-237, 207.

3.2 Tibet at the Time Prior to the Chinese Insurgence

The legal position of Tibet is contrasted by Chinese arguments supporting unification of Tibet within China and territorial integrity of China, on the one hand, and Tibetan arguments as to the long-standing independence of Tibet, on the other. This dissonance resonates over centuries, but a common factor emerges in the conquest of China by the Mongols under Genghis Khan (1162-1227)⁴ and the similar absorption of Tibet. Thus both Tibet and China were subject to Mongol invasion,⁵ and indeed the Dalai Lama's temporal power is said to derive from donation by Kublai Khan, Mongol Emperor of China in the thirteenth century.⁶ In 1644 the Manchu, having invaded China, captured Peking (Beijing) and founded their new dynasty, to be known as the Qing,⁷ in which the Mongols 'became a junior partner'.⁸ At about the same time, Mongol power established the Dalai Lama as religious sovereign over Tibet.⁹

Although Tibet and China were both subjugated by the Mongols, the subjugations were unrelated.¹⁰ Over the years, however, an interactive relationship subsisted between the Tibetan government and the imperial court of the Manchu, but the extent of Chinese influence in Tibet was sporadic, 'undergoing several changes during its

⁴ Grunfeld AT, *The Making of Modern Tibet*, Revised Edition (Armonk, New York, and London: ME Sharpe, 1996) 38.

⁵ International Commission of Jurists, *The Question of Tibet and the Rule of Law* (Geneva: International Commission of Jurists, 1959) 75.

⁶ Rubin AP, 'A Matter of Fact' (1965) 59(3) *American Journal of International Law* 586-590, 586. See also Richardson HE, *Tibet and Its History*, Second Edition, Revised and Updated (Boulder and London: Shambhala, 1984) 34 and van Walt van Praag MC, *The Status of Tibet: History, Rights, and Prospects in International Law* (London: Wisdom Publications, 1987) 5-6.

⁷ Richardson, note 6 above, 43.

⁸ Bulag UE, *The Mongols at China's Edge: History and the Politics of National Unity* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 2002) 6.

⁹ See Richardson, note 6 above, 41; International Commission of Jurists, note 5 above, 75.

¹⁰ Van Walt van Praag, note 6 above, 7.

existence of nearly two centuries between 1720 and 1912'.¹¹ During this latter period the principal symbol of Chinese control over Tibet comprised two representative residents known as *ambans*, first installed at Lhasa in 1720, who were, rather than exerting internal control, mediators between local rulers and the Qing authorities; to all intents and purposes, Tibet during this time was 'an integral political entity, governed by the local religious leaders and feudal lords'.¹² The precise Sino-Tibetan relationship, though, is subject to extensive and polarised debate,¹³ and it is clear that, for instance, the power of the *ambans* 'varied considerably in accordance with many factors such as their personality and competence in relation to that of the leaders of Tibet, and the nature of the political situation in China and Tibet at any point in time'.¹⁴

The Chinese Qing Empire was overthrown in 1911, and with its collapse and the subsequent four decades of turmoil in China Tibet 'enjoyed virtually complete de facto independence'.¹⁵

3.2.1 *Turmoil in China and Repercussions in Tibet*

The 1911 revolution followed hard upon an attempt by China to increase its influence in Tibet. By February 1910 the Chinese general Zhao Erfeng had controlled the eastern borderlands of Tibet by force and had reached Lhasa, compelling the

¹¹ Richardson, note 6 above, 50.

¹² Wang Lixiong, 'Reflections on Tibet' (2002) 14 *New Left Review*, March-April, 78-111, 79, emphasis added; see also 80. Early Tibetan government, going back to the seventeenth century, 'expressed its religious ideology with the term *chösi nyitrel*, which translates as "religion and political affairs joined together"' (Goldstein (1989), note 2 above, 2); Tibetan religious and political affairs remain intertwined today.

¹³ See, for example, Richardson, note 6 above; Grunfeld, note 4 above; van Walt van Praag, note 6 above; International Commission of Jurists, note 5 above.

¹⁴ Goldstein MC, *The Snow Lion and the Dragon: China, Tibet, and the Dalai Lama* (Berkeley and Los Angeles, CA: University of California Press, 1997) 20-21.

¹⁵ Wang Lixiong, note 12 above, 81; see also section 4.4.2.3 below.

Thirteenth Dalai Lama to escape and seek refuge in India.¹⁶ In addition, for the first time, Tibet had appealed to Great Britain and other foreign powers for assistance against the Chinese.¹⁷ The Chinese encountered resistance from the Tibetans, and subsequent to the 1911 revolution the Chinese troops in Lhasa mutinied against their officers.¹⁸ Tibetans followed this lead, and after an anarchic period and intervention by the Nepali Resident in Lhasa all Chinese soldiers were removed from Tibet. By April 1913 all Han Chinese had been expelled and none remained in Tibet.¹⁹

At this time there was a complete severance of Tibetan ties with the Manchus, and this leads Michael van Walt van Praag to argue that no legal or political ties ‘existed between the new Chinese President and the Dalai Lama, in 1911’.²⁰ A political vacuum existed in China and this strengthened the position of both Britain and Russia in the region. One outcome was the Simla Conference, which opened in October 1913, involving China, Britain and Tibet. In their opening statements, the Tibetan representative emphasised that Tibet was an independent state, whereas China forcefully expressed the claim that Tibet was an integral part of the territory of the Republic of China.²¹ An agreement was achieved at the Conference whereby, inter alia, Chinese suzerainty over Tibet was recognised,²² the autonomy of Outer Tibet²³

¹⁶ Goldstein (1989), note 2 above, 51-54. The advance units of Zhao’s force arrived in Lhasa on 12 February 1910.

¹⁷ Richardson, note 6 above, 95-98; Goldstein (1989), note 2 above, 51, referring to the message of the Dalai Lama to Great Britain as contained in the *Tibetan Blue Book of 1910*, India Office Records and Archives.

¹⁸ Goldstein (1989), note 2 above, 59.

¹⁹ See, for example, Richardson, note 6 above, 95-102; Grunfeld, note 4 above, 63-64. Also, Goldstein (1989), note 2 above, 59.

²⁰ Van Walt van Praag, note 6 above, 136; see generally 134-136, and see also Alexandrowicz-Alexander CH, ‘The Legal Position of Tibet’ (1954) 48(2) *American Journal of International Law* 265-274, 270 and International Commission of Jurists, note 5 above, 85; ‘Tibet unquestionably controlled its own internal and external affairs during the period from 1913 to 1951 and repeatedly attempted to secure recognition and validation of its de facto autonomy/independence’: Goldstein (1989), note 2 above, 815.

²¹ Goldstein (1997), note 14 above, 32.

²² Suzerainty may be defined ‘as a kind of international guardianship, since the vassal state [here Tibet] is either absolutely or mainly represented internationally by the suzerain state [here China]’: Dibyesh

was recognised, and China agreed to ‘respect the territorial integrity of Tibet and abstain from interference with the administration of Outer Tibet . . . which was to remain in the hands of the Tibetan Government at Lhasa’.²⁴ However, while all parties initialled the agreement it never entered into force as the Chinese Government refused to sign it and therefore give it effect.²⁵ Had the negotiating parties been able to come to terms at this point the legal position of Tibet would have been fully clarified.²⁶ Nevertheless, and although the Simla Convention is not binding on China, ‘it is the best evidence of what the negotiating parties thought of Tibet’s status at the time – or, perhaps, of what they hoped Tibet could successfully claim’.²⁷ Thus in 1914 it may be concluded that, while Tibet benefited from substantial autonomy, it was not regarded as an independent country *de jure*, either by Britain or by China.²⁸

The next decades were punctuated by instances of overtures by China to Tibet and periods of hostilities, during a period when China sought internal stability.²⁹ The

Anand, ‘The Tibet Question and the West: Issues of Sovereignty, Identity, and Representation’ in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 285-304, 288, referring to van Walt van Praag, note 6 above, 107, quoting from Oppenheim L, *International Law*, ed. H Lauterpracht, Eighth Edition (London: 1955). The difficulty so far as Tibet is concerned in overcoming the hurdle of suzerainty and the status of a vassal state lies in its failure to participate in international relations and its pursuit of an insular policy: section 3.4.3 below.

²³ Outer Tibet, which excluded a buffer zone, designated Inner Tibet, to the north and east – considered a buffer region for China.

²⁴ International Commission of Jurists, note 5 above, 86. See also Grunfeld, note 4 above, 64-67; van Walt van Praag, note 6 above, 54-60; Alexandrowicz-Alexander, note 20 above, 271; and Park N, *Between Heaven and Earth: A Study of Tibetan Self-Determination* (Unpublished BA Thesis: Flinders University of South Australia, 1994) 16. Article 2 of the Convention.

²⁵ See, for example, Grunfeld, note 4 above, 67; van Walt van Praag, note 6 above, 58. See also Goldstein (1989), note 2 above, 74-75 and, for the text of the Simla Convention, Appendix C.

²⁶ Tieh-Tseng Li, ‘The Legal Position of Tibet’ (1956) 50(2) *American Journal of International Law* 394-404, 400.

²⁷ Crawford J, *The Creation of States in International Law*, Second Edition (Oxford: Clarendon Press, 2006) 325.

²⁸ Also Goldstein (1997), note 14 above, 34: ‘Since China did not agree to the convention, Tibet still had no *de jure* status accepted by China.’

²⁹ See, for example, International Commission of Jurists, note 5 above, 88. In 1917, for instance, the Chinese made military advances into Kham, which were met with a major victory by the Tibetan forces (Goldstein (1989), note 2 above, 83). Equally a Chinese initiative in 1930 was premised on the basis ‘that the time was right for Tibet and China to settle their differences’ (ibid 215) and led to cordial negotiations. However, fighting again broke out in Kham, and this escalated into the Sino-Tibetan war of 1930-1932 (ibid 215-221).

Chinese Nationalist Government and Chinese Communist Party were in ever-increasing conflict, and by October 1949 the Nationalist rump had fled to Taiwan and Mao Zedong had proclaimed the People's Republic of China.³⁰

3.2.2 Governance, Religion and Culture in Tibet 1911-1950

At the core of governance, religion and culture in Tibet is Buddhism. It was this way of life, and all appurtenant to it, that ultimately came under threat from Chinese Communism.

The Buddhist religion first arrived in Tibet, initially on a small scale, from Nepal, India and China in the seventh century, gradually displacing while absorbing the former animist religion of Bön. Towards the end of the eighth century, key doctrinal debates took place over whether Chinese or Indian teachings should be followed, with the latter prevailing. By 1642 the Tibetan Buddhist church had acquired absolute dominance in temporal affairs and had come to dominate Tibetan life.³¹

At the heart of Tibetan Buddhism lies the system of reincarnating lamas, the Dalai Lama being the prime exemplar.³² It is through this system that the elite can maintain power, and that power can be transferred in a peaceful and orderly fashion. The religion was reformed in the early fifteenth century, and it is from that time that the power of the religion itself increased and the power of the Gelugpa sect within the

³⁰ See, for example, Addy, note 1 above, 40. The People's Republic of China was proclaimed on 1 October 1949: Cohen JA, 'Introduction' in JA Cohen (ed.), *China's Practice of International Law: Some Case Studies* (Cambridge, MA: Harvard University Press, 1972) 1-13, 1.

³¹ See Snellgrove D and Richardson H, *A Cultural History of Tibet* (Boulder: Prajñā Press, 1980) 73-79; also Richardson, note 6 above, 11ff: 'From that time Church and State were almost interchangeable terms and all political matters were looked on as subordinate to the needs and interests of religion', at 11.

³² By this system lamas such as the Dalai Lama are 'believed to be continually reincarnated in human form': Goldstein (1989), note 2 above, 35.

religion dated.³³ It is the Gelugpa sect, led by the incarnation of the Dalai Lama, which to all intents and purposes represents the Tibetan religion today.³⁴

Buddhism exerted influence over Tibetan society to such an extent that it became all embracing. The scope of literature was restricted to religious works; culture was much influenced by religion, for example paintings and woodcarvings are virtually entirely religious in nature; and education and social organisation revolved around religion and the monasteries.³⁵ Society became dependent upon the religion and in turn fed the religion. The counterpoint of this religious dominance was a feudal society, which persisted into the twentieth century.³⁶

This was the situation that pertained at the death of the Thirteenth Dalai Lama in December 1933, and his death left Tibet in a state of some difficulty, with increasing hostility evident from China.³⁷ Tibet came under the administration of a regent, as it had done in the past, pending the selection of the reincarnation of the Dalai Lama and his subsequently attaining his majority and the ability to take up the reins of power. The Fourteenth Dalai Lama, the current incarnation, was discovered in 1937 at Takster, in the Amdo province, and was officially recognised by the Tibetan Government in August 1939.³⁸ He ultimately assumed full powers over Tibet when still a minor, at the age of fifteen, at the request of the National Assembly, on 17

³³ The Gelugpa sect is also known as the Yellow Hat sect because its monks wear yellow hats. This is in contrast to the other Tibetan Buddhist sects which all wear red hats. The literal meaning of Gelugpa is 'the ones of the virtuous path'. See Goldstein (1989), note 2 above, 1. The three major monastic seats of the Gelugpa sect were the monasteries of Sera, Drepung, and Ganden, which 'were enormous, resembling bustling towns as much as sanctuaries for the pursuit of otherworldly studies' (ibid 24).

³⁴ This thesis does not pretend to incorporate a history of the Tibetan religion. For further details as to this see, for example, Grunfeld, note 4 above, 40-41 and attendant footnotes; Richardson, note 6 above, 40-42; Snellgrove D, *Himalayan Pilgrimage: A Study of Tibetan Religion* (Boulder: Prajñā Press, 1981) 177-203.

³⁵ Richardson, note 6 above, 12-16.

³⁶ See, for example, Goldstein (1989), note 2 above, 3-6, 37.

³⁷ The pressures from China were such that, with the death of the Thirteenth Dalai Lama, Melvyn Goldstein writes: 'Tibet's fight to maintain her de facto independence was on': Goldstein (1989), note 2 above, 145.

³⁸ Ibid 316-324.

November 1950. This was at a time of political crisis following the military invasion of Eastern Tibet by Chinese forces.³⁹ The feudal nature of the Tibetan society had continued to that time, an inherent disadvantage of the system.⁴⁰

As at 1950 Tibet had established an independent and unique, if flawed, culture, which was soon to be dominated by China. The societal contrast with China was significant, although not without parallels, even though each society had experienced Buddhism and had experienced common threads in their relationship over the centuries.

3.2.3 Buddhism in Tibet and Confucianism in China

As has been noted above, the dynamic of Buddhism had come to dominate life in Tibet. The Buddha's message is seen as one of non-violence and compassion, as a result of which for Tibetans 'the path of non-violence is a matter of principle'.⁴¹ It is this path that led to acceptance by the people of their position in society, perpetuating the feudal nature of the society, and also led to the society being unable to counter invasion by force. War had been abandoned as an instrument of national policy as the populace 'sought to respect every form of life'.⁴²

Buddhism had been introduced into China during the Han period, 206 BC-220 AD, from Persia, Central Asia and India, and subsequently gained in influence, before declining under persecution in the ninth century.⁴³ Buddhism in China thus pre-dates

³⁹ See Goldstein (1989), note 2 above, 638-707. See also van Walt van Praag, note 6 above, 144-145.

⁴⁰ For Wang Lixiong, the price extracted by Buddhism was fear – by worshipping and obeying the devotee received reassurance – Wang Lixiong, note 12 above, 92.

⁴¹ Tenzin Gyatso, 'Tibet: Communist China and Human Rights' (1997) 63(14) *Vital Speeches of the Day* 423-424, 423.

⁴² Ibid.

⁴³ References to Buddhism in China first appeared as early as 130 AD, although there is little indication that it had influence at that time on Chinese life or thought. Religious belief was then based on Taoism but, as the Han Empire decayed, by around 300 AD a favourable climate permitted the emergence and spread of Buddhism throughout China, in the face of a rejection of Confucian thought tainted by a failing Han order. It should not be presumed that Buddhism prevailed to the extent that a resurgence of

Buddhism in Tibet. The corollary, though, was that Tibetan Buddhism gained influence in China, particularly during the period of Mongol domination. At the time of the initial introduction of Buddhism into China, predominant in the country were Confucianism and Taoism. Confucianism had drawn on Taoism and had from various sources created a new rationale of imperial power, adapting itself to the realities of the Han Empire. Both this empire and the Confucians opposed feudalism, some two millennia ago⁴⁴ – a feudalism opposed in Tibet in the last half century by the Communist successors of early Han China. Confucianism is the thread that weaves through Chinese society, just as Buddhism is the backdrop to Tibetan society.⁴⁵

The doctrines of the classical Chinese thinkers Confucius and Mencius survived Buddhism, and indeed survive to the present day. Traditional Chinese ideas, enshrined in the doctrine of Confucianism, influence modern China, as they influenced China in the Qing and Republican eras, and Chinese Communism owes much to the Mencian belief that ‘safeguarding people’s material needs was not only one of the obligations of government, but its *principal* obligation’.⁴⁶

This obligation to safeguard people’s material needs provides a reason for Chinese intervention in Tibet, apart from arguments relating to unification and territorial

Confucianism was precluded though, and indeed Confucian thought was revived. Long before the ninth century official action was taken to restore Confucianism. See Wright AF, *Buddhism in Chinese History* (Stanford, CA: Stanford University Press, 1959) 21-32, 86-87.

⁴⁴ Wright, *ibid*, 15.

⁴⁵ For historical background of Buddhism, Confucianism and Taoism, which this thesis does not purport to attempt to cover in any depth, see, for example, Wright, *ibid*, and also Wright AF (ed.), *Confucianism and Chinese Civilization* (Stanford, CA: Stanford University Press, 1964, reissued 1975), especially Schwartz B, ‘Some Polarities in Confucian Thought’ 3-15.

⁴⁶ Weatherley RD, *The Discourse of Human Rights in China: Historical and Ideological Perspectives* (Unpublished PhD Thesis: University of Newcastle upon Tyne, 1997) 161, emphasis in original; see also Weatherley generally in this context. A basic criterion of Confucianism, a commitment to public service, is also of relevance in this connection, and in Confucianism ‘A central polarity . . . is the polarity of self-cultivation . . . leading to personal self-realization . . . and the ordering and harmonizing of the world’ (Schwartz, *ibid*, 5). For Mencius, ‘the good social order was the outer manifestation of spiritual and moral capacities innate in the individual human being’ (Schwartz, *ibid*, 8). These tenets materialise in the People’s Republic in the stress given to the collective interests of the family and society rather than the individual: see section 2.3.3 above and section 5.3.3 below.

integrity.⁴⁷ This reasoning relies heavily on the need to emancipate what might be termed the proletariat from the feudal society subsisting.

Thus there is evidence that the basis of each of the Tibetan and Chinese societies differs. Each society has parallels, in the existence of beliefs stretching back over many centuries, but the root beliefs are at variance. In turn the societies produced by these beliefs came to be very different, and with this in mind I turn to the events of 1950-1951.

3.3 An Invasion or Liberation?

3.3.1 A Synopsis

In the dying days of the Republican regime of Chiang Kai-shek in 1949, the Regency in Tibet proclaimed Tibetan independence.⁴⁸ The incoming Chinese Communist Government denounced that declaration, and insisted that ‘both the Chinese and Tibetan peoples were anxiously awaiting the region’s “liberation” from oppressive colonialism and reactionary exploitation’.⁴⁹ The upshot was that in 1950 the Peking Government despatched troops into eastern and north-eastern Tibet. Appeals by Tibet to the outside world, including the United Nations, were ignored; Tibet had insufficient military capacity to repel the Chinese troops; Tibet capitulated; and on 23

⁴⁷ The People’s Republic portrays pre-1951 Tibet as a dark and backward region – ‘a house of horrors’ where serious human rights violations were prevalent: Sautman B and Dreyer JT, ‘Introduction: The Tibet Question in Contemporary Perspective’ in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 3-22, 8.

⁴⁸ Ginsburgs G, ‘Peking – Lhasa – New Delhi’ (1960) 75(3) *Political Science Quarterly* 338-354, 338. See also Grunfeld, note 4 above, 79, referring to the ‘most daring gesture’ made by the ‘Lhasa government . . . in asserting its independence: it ordered the Chinese Mission to leave Lhasa’; Goldstein (1989), note 2 above, 613: ‘One step the Tibetan government took was to close the Chinese Mission and expel all Chinese officials from Tibet.’

⁴⁹ Ginsburgs, *ibid*, 339. Indeed, if there is one subject on which the Chinese Republican regime and the Communists were in agreement, it was that both ‘believed that historically Tibet was a part of China and [both] sought to reunify it with the “mother” country’: Goldstein (1989), note 2 above, 815.

May 1951 the Agreement on Measures for the Peaceful Liberation of Tibet was signed.⁵⁰ Following the Agreement, Chinese troops entered Lhasa.⁵¹

3.3.2 *The Agreement on Measures for the Peaceful Liberation of Tibet*

This Agreement, commonly known as the Seventeen-Point Agreement, was to define the relationship between China and Tibet during the 1950s and, even though abrogated by the Chinese,⁵² is of relevance to the present day in interpreting this relationship. The Chinese Government and the Tibetans view its inception, together with the surrounding circumstances, very differently, and their views are the subject of sections 3.3.3 and 3.3.4 below. This section concentrates on briefly outlining the main provisions of the Agreement itself.⁵³

Article 1 provides that ‘the Tibetan people shall return to the big family of the motherland – the People’s Republic of China’, thus emphasising that Tibet is an

⁵⁰ Ginsburgs, *ibid*, 338-342. Also Goldstein (1989), note 2 above, chapters 18-20 for comprehensive detail of this period. The Indian Government protested to China against the decision to send troops into Tibet, and this attitude was supported by both the US and British Governments. However, Tibet’s claim for full political independence found no formal support, and India believed it was essential that friendly relations should be maintained between India and China: see Keesing’s Record of World Events, ‘Chinese “Liberation” Invasion of Tibet’, vol. VII-VIII, 1950 Chinese, page 11101; van Walt van Praag, note 6 above, 143, quoting from a Note from the Indian Foreign Ministry to the Chinese Government of 26 October 1950. No resolutions were passed by the UN Security Council or General Assembly with respect to Tibet either in 1950 or 1951. At this time the General Assembly was preoccupied with the Korean question – see section 3.4.3 below. In 1950, El Salvador asked the UN General Assembly to consider the Tibetan appeal but, particularly due to a US offensive in Korea, consideration of the draft resolution was postponed *sine die*; other factors included India’s failure to support a discussion in the General Assembly, British and American deferral to the Indian viewpoint, and the urging of an adjournment by the Russian delegate: see van Walt van Praag, *ibid*, 145; Sloane RD, ‘The Changing Face of Recognition in International Law: A Case Study of Tibet’ (2002) 16 *Emory International Law Review* 107-186, 144; and Tsering Shakya, *The Dragon in the Land of the Snows: A History of Modern Tibet Since 1947* (London: Pimlico, 1999) 55-57. The Indian Government’s attitude to the Seventeen-Point Agreement was fatalistic, and India was ‘prepared to accept the new situation created by the Seventeen-Point Agreement as a *fait accompli*’ – van Walt van Praag, *ibid*, 149; see also *Foreign Relations of the United States* 7 (1951) 1691-1693: the British continued to support the Indian position.

⁵¹ See note 2 above and related text.

⁵² See section 3.4.2 below.

⁵³ The translated text of the agreement can be found in various places including, for example, van Walt van Praag, note 6 above, 337-340; also <<http://www.freetibet.org/info/file/file2.html>>, accessed on 3 August 2005.

integral part of Chinese territory. By Article 2 the People's Liberation Army were permitted 'to enter Tibet and consolidate the national defences', 'national' here referring to China, and by Article 8 Tibetan troops were to become part of the national defence forces.

Article 3 is of importance in that it accords 'the Tibetan people . . . the right of exercising regional autonomy', and the issue of autonomy will be reverted to below,⁵⁴ while Article 4 states that the existing political system in Tibet will not be altered. Freedom of religious belief is protected by Article 7, and Article 14 provides for the 'Central People's Government' – the Chinese Government – to handle 'all external affairs of the area of Tibet'.

Other articles in the Agreement deal with, inter alia, the status, functions and powers of both the Dalai Lama and the Panchen Lama, the second most authoritative incarnate lama in Tibet, and also language, education, commerce and reforms.

3.3.3 The Chinese Perspective

The Chinese view can be summarised as one revolving around liberation of Tibet and enhancement of the territorial integrity of the state. Following the foundation of the People's Republic of China, in January 1950 the authorities in Tibet were requested to send delegates to Peking with a view to negotiating a 'peaceful liberation' of Tibet. The Tibetan Regent rejected this call, after which the People's Liberation Army crossed the 'Jinsha River' in October 1950 to liberate the people of Tibet and to consolidate national defences.⁵⁵ Specifically, on 24 October Peking announced that

⁵⁴ See especially sections 3.5.2 and 6.4.

⁵⁵ See the White Paper published by the Information Office of the State Council of the People's Republic of China, 'Tibet – Its Ownership and Human Rights Situation', available at <<http://www.china.org.cn/e-white/tibet/index.htm>>, Part One: Ownership of Tibet; also van Walt van

the People's Liberation Army had advanced into Tibet 'to free three million Tibetans from imperialist oppression and to consolidate the national defences of China's western frontier'.⁵⁶ This needs to be seen in the context of the declaration from Peking on 1 January 1950 that it still had to liberate Tibet, Taiwan and Hainan Island.⁵⁷

China's essential position as to Tibet has been constant over centuries. This is that Tibet's central government was not a national government, but a 'local' government.⁵⁸ Hence the involvement of Chinese troops is justified as an internal matter relating to territorial integrity and unification of the state; it was not the invasion of an independent state. In so far as self-determination is of relevance, therefore, it is to emphasise territorial integrity, in this case of China. The involvement of China in Tibet is then one that emphasises non-intervention of the international community in the internal affairs of China, in addition to emphasising the collective interest of the state.⁵⁹

Praag, note 6 above, 142. The White Paper is a document forming a historical and political presentation. See also Goldstein (1989), note 2 above, 690: the Jinsha is otherwise known as the Yangtse. There had in fact been talks in Delhi in September and early October 1950, prior to the incursion of the People's Liberation Army, between a Tibetan Mission and Chinese representatives in India. As a result of the offensive the talks broke down and the Dalai Lama assumed full powers in November 1950: see generally Goldstein, *ibid*, 671-707, also section 3.2.2 above. The Chinese version of events, rather than referring to the negotiations of the Tibetan Mission and the difficulties and delays it encountered, for example over passports, instead centres on the rejection by Tibet of the call for negotiations.

⁵⁶ International Commission of Jurists, note 5 above, 94.

⁵⁷ Grunfeld, note 4 above, 95; Goldstein (1989), note 2 above, 638.

⁵⁸ *Ibid* 255. A local government in the sense of not being a state government.

⁵⁹ See section 2.3.3 above. Intervention of the international community, of other states, is seen as aggression. For example, the Chinese Communist Party Secretary in Tibet in 2000 stated that 'So called "Tibetan independence" is the outcome of imperialist aggression against China in modern history, in a vain attempt to divide the Chinese nation. It is the outcome of class struggle on an international scale': Sautman and Dreyer, note 47 above, 8, quoting from *Xizang Ribao*, 18 October 2000, 1 (*Xizang Ribao* is a Chinese regional newspaper from Tibet). JK Fairbank notes that 'the revolution, which brought a sort of self-determination to the Chinese people, kept them in a colonialist-imperialist posture toward the adjoining peoples in Tibet, Sinkiang, and Mongolia': Fairbank JK, *The Great Chinese Revolution: 1800-1985* (London: Chatto & Windus, 1987) 167-168; also Sloane, note 50 above, 140-141.

Subsequent to the 1950 invasion the Chinese Government again requested the Tibetan authorities to despatch delegates to Peking to negotiate.⁶⁰ In February 1951 a delegation was sent to Peking, and in May 1951 the Seventeen-Point Agreement was concluded, defining the legal position between China and Tibet.⁶¹ The Chinese position is that the Dalai Lama⁶² agreed to the provisions of the Agreement before it was signed by the Tibetan delegation and that the Tibetan National Assembly ratified the Agreement. Further, that there was no international protest at the time it was signed, and that the United Nations would not enter into discussion on it. In addition, the Agreement was recognised both by India and Nepal in international treaties of 1954 and 1956 respectively,⁶³ and the Dalai Lama did not protest the Agreement for almost a decade.⁶⁴ Thus the validity of the Seventeen-Point Agreement is not open to question, and indeed, from the Chinese viewpoint, due to the internal nature of the situation, no state and no one would have any standing to cast doubt on the legality of the Agreement.

The position is therefore that Tibet is part of China, that Tibet was liberated in 1950 and 1951, reinforcing the territorial integrity of the state, and that the Seventeen-Point

⁶⁰ Goldstein (1989), note 2 above, 742ff.

⁶¹ See 'Tibet – Its Ownership and Human Rights Situation', Part One: Ownership of Tibet, note 55 above, and Tieh-Tseng Li, note 26 above, 403-404; Goldstein (1989), note 2 above, 745ff.

⁶² By that time vested with his powers.

⁶³ The particular relevance being that India and Nepal are neighbouring states, and states with which Tibet had dealings, both religious and political: see section 3.2.2 above and section 4.4.2.4 below. The Sino-Indian Trade Agreement over Tibetan Border of 29 April 1954 referred to 'mutual respect for each other's territorial integrity and sovereignty' and thus India implicitly recognised Chinese sovereignty over Tibet: accessed through <<http://www.tibetjustice.org/materials/china/china4.html>>, 27 February 2007. In October 1956 an Agreement on Economic Aid between China and Nepal was signed, under which Nepal recognised China's sovereignty over Tibet; thus Nepal has received economic aid from China, and in turn has provided support to China over issues such as Tibet, Taiwan and also human rights: see, for example, People's Daily Online, 'China, Nepal Pledging Closer Ties' (2002)

<http://english.people.com.cn/200207/11/print20020711_99490.html>, accessed 27 February 2007. See, too, Rubin AP, 'The Position of Tibet in International Law' (1968) 35 *The China Quarterly* 110-154, 145: 'India in 1954, and Nepal in 1956, recognised Chinese sovereignty over the territory of Tibet'; and van Walt van Praag, note 6 above, 168. If of course the Seventeen-Point Agreement violated international law, the recognition of Chinese sovereignty over Tibet would not be of significance in international law; the violation would be determinative. See also note 76 below.

⁶⁴ Grunfeld, note 4 above, 258.

Agreement clarified Tibet's legal status. The state of China is not, of course, even now entirely unified, and cannot be until Taiwan returns to 'the motherland'. Nevertheless, for China:

The peaceful liberation put an end to imperialist aggression against Tibet, enabled the Tibetan people to shake off political and economic fetters, safeguarded the unification of state sovereignty and territorial integrity, realized equality and unity between the Tibetan ethnic group and all other ethnic groups throughout the country as well as the internal unity of Tibet, and laid the foundation for regional ethnic autonomy in Tibet.⁶⁵

This stresses not only the territorial integrity of China, but also the right of Tibet to regional autonomy, which in turn, as referred to in the Seventeen-Point Agreement, involves the Chinese undertaking 'not to alter the existing political system of Tibet or the status, functions and powers of the Dalai Lama'.⁶⁶ It reflects the fact that China regarded Tibet as part of its domain, while allowing a large measure of autonomy.⁶⁷ This view that Tibet is a part of China was the view of China in 1951, as it had been in 1914.⁶⁸

⁶⁵ Information Office of the State Council of the People's Republic of China, 'Tibet: China's Policy Paper on Tibet' (2004), *Unrepresented Nations and Peoples Organisation Home Page*, 3 <<http://www.unpo.org/article.php?id=655>>, accessed 4 November 2004. See though, with regard to terminology of ethnic groups and minority nationalities, section 2.3.1 above and section 3.5.2 below.

⁶⁶ Ginsburgs G and Mathos M, 'Tibet's Administration in the Transition Period, 1951-1954' (1959) 32(2) *Pacific Affairs* 162-177, 162; see Seventeen-Point Agreement, Article 4, as referred to in section 3.3.2 above.

⁶⁷ Tieh-Tseng Li, note 26 above, 394.

⁶⁸ This attitude of China goes some way to explaining the contrasting situation concerning the Republic of Cyprus. Cyprus was not an independent state until 1960, achieving independence in that year following 'drawn-out negotiations between the Governments of Greece and Turkey': Crawford, note 27 above, 242. Cyprus was recognised as an independent state subsequent to the agreement of the Greek and Turkish Governments (although for the Greek Cypriots the aim was *enosis* – unification with Greece), and as a result 'No question of its independent status has been raised by other States or international organizations' following its admission to the UN on 20 September 1960 (ibid 243). Tibet, on the other hand, has not had Chinese support for its independence, despite its de facto independent state in the years prior to 1950. Although the independent status of Cyprus may not have been in issue

3.3.4 The Tibetan Perspective

The counter-argument is one of invasion by China of an independent country, Tibet, and duress with respect to the Seventeen-Point Agreement. Proponents of this position view Tibet, at the time, as ruled by her own theocratic government and completely independent of Peking: ‘no ethnic Chinese government ever ruled Tibet until it was overrun in the 1950s by the Communists’.⁶⁹ Thus the invasion and the Seventeen-Point Agreement brought an end to Tibet’s de facto independence.⁷⁰

The duration of the de facto independence is an issue of dispute. Advocates of the Tibetan argument can though point to a general agreement that Tibet was fully independent after 1912, if not during the period of the Qing dynasty.⁷¹ By 1912 Tibet was free of any Chinese control, and this freedom persisted until 1950, certainly with regard to Outer Tibet – what may be termed ‘political’ Tibet as opposed to ‘ethnographic’ Tibet.⁷² If Tibet was an independent state at the time of the invasion and Seventeen-Point Agreement, then the Agreement must be looked at in terms of an

since it achieved independence, Cyprus has not been at peace and violence between the Greek and Turkish communities broke out as early as December 1963. UN peacekeeping forces were subsequently stationed on the island in 1964 and remain there today. In effect, Cyprus has been partitioned since 1974, and to date there has been no agreed settlement between the Greek and Turkish Cypriots. Attempts to reunite Cyprus prior to EU accession on 1 May 2004 failed: Palley C, *An International Relations Debacle: The UN Secretary-General’s Mission of Good Offices in Cyprus 1999-2004* (Oxford and Portland, Oregon: Hart Publishing, 2005) 14-15 and 22. Cyprus then is another issue that has rumbled on over the last half-century.

⁶⁹ Seymour JD, ‘Introduction’ in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) xi-xxviii, xviii; see also Ginsburgs, note 48 above, 341.

⁷⁰ Ginsburgs and Mathos, note 66 above, 162; Goldstein (1989), note 2 above, 765.

⁷¹ Song Liming, ‘Reflections on the Seventeen-point Agreement of 1951’ in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 55-70, 58, and note also the comments at note 7 thereof; see, in addition, Wei Jingsheng, ‘A Letter to Deng Xiaoping’ in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 75-89, 82; Sloane, note 50 above, 146. Note also that Article 1 of the Seventeen-Point agreement refers to Tibet’s *return* to the motherland, as mentioned in Song Liming, 60.

⁷² See Goldstein (1994), note 2 above, especially 87; also Seymour, note 69 above, xviii. An assertion that Tibet was independent in 1912, and remained so until 1950, does not carry with it the implication that Tibet was always an independent state: Sloane, note 50 above, 131.

international treaty rather than an agreement internal to the affairs of the Chinese state.⁷³

Despite China's argument that the Agreement was voluntary, this is contradicted by the Tibetan reaction, in the first place, to the October 1950 invasion. In December of that year the Dalai Lama left Lhasa in secret for the town of Yatung, close to the Indian border, following a request from the Tibetan National Assembly who feared his capture by the People's Liberation Army. In his absence from the capital the Cabinet empowered a delegation to negotiate directly with China in Peking. During the negotiations this delegation was out of communication with the Tibetan Government, and suffered threats of personal violence and also further military action against Tibet. Under such duress they certified the Agreement, unauthorised by the Dalai Lama and Cabinet.⁷⁴ It is, though, true that the United Nations declined to consider the case of Tibet, but it is equally the case that this was on the recommendation of India, whose principal concern was not with Tibet per se but 'to minimize friction with China',⁷⁵ an example of realism at work within the international arena.

As to the assertion that the Dalai Lama failed to condemn the Agreement, it is worth quoting from the Dalai Lama's statement at Mussoorie, India, after he had left Tibet in 1959 for exile:

⁷³ In this context a preliminary question would centre on whether Tibet is indeed a state. See Article 1 of the Montevideo Convention on Rights and Duties of States: section 2.3.2 above and section 4.2.1 below.

⁷⁴ Avedon JF, *In Exile from the Land of Snows: The Dalai Lama and Tibet Since the Chinese Conquest* (New York: HarperPerennial, 1994, reissued 1997) 34-36; see also on the question of duress and coercion Song Liming, note 71 above, 57, and van Walt van Praag, note 6 above, 154-155; Goldstein (1989), note 2 above, 743, regarding the departure for Yatung, and with regard to the Agreement, 771: 'Surprisingly the Tibetan delegation did not stipulate that they wished to delay the announcement of the agreement until they could inform their own government.'

⁷⁵ Avedon, note 74 above, 34; cf Addy, note 1 above, 40-41, van Walt van Praag, note 6 above, 142-143.

The agreement which followed the invasion of Tibet was also thrust upon its people and Government by threat of arms. It was never accepted by them of their own free will. Consent of the Government was secured under duress and at the point of bayonet. My representatives were compelled to sign the agreement under the threat of further military operations against Tibet by invading armies of China leading to the utter ravage and ruin of the country . . .

While I and my Government did not voluntarily accept that agreement we were obliged to acquiesce in it and decided to abide by its terms and conditions in order to save my people and country from the damages of total destruction.⁷⁶

The reference to the obligation to acquiesce to and abide by the Agreement reflects the imposition of the Agreement by China, and the difficulty and danger the Dalai Lama would have had in protesting the same while in Tibet, bearing in mind the subsisting fear of China and the potential repercussions.

The Tibetan argument is that the Agreement was imposed on a sovereign state⁷⁷ by China, under duress: effectively the terms of the Agreement were in the nature of an ultimatum as opposed to resulting from a negotiated settlement. Thus the Agreement

⁷⁶ Quoted in International Commission of Jurists, note 5 above, 96; the statement was made on 20 June 1959. See also van Walt van Praag, note 6 above, 155. By Article 51 of the 1969 Vienna Convention on the Law of Treaties, 'The expression of a state's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect': done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331. Thus if Tibet was a state in 1951, and the Seventeen-Point Agreement was therefore entered into between states, it is arguable that if the Agreement were entered into under duress then it would not be valid. Also note, though, that the Vienna Convention is not to be applied retrospectively (Article 4). However, Article 2(4) of the Charter of the United Nations prohibits 'the threat or use of force against the territorial integrity or political independence of any state', and therefore, if Tibet was a state prior to the Chinese insurgence, the actions of China in the threats and use of force against Tibet would breach this paragraph of the UN Charter: the People's Republic of China was not though a member of the UN at that time (nor indeed was Tibet), China's seat being held by the Republican Chinese Government. It is worth bearing in mind that 'The international community has with considerable consistency refused to accept the legal validity of acts done or situations achieved by the illegal use of force': Crawford, note 27 above, 132. The international community, however, has in effect accepted the validity of acts effected by the People's Republic in Tibet: see section 3.4.3 below.

⁷⁷ See Chapter 4 below with reference to sovereignty.

had no legal effect and was void *ab initio*.⁷⁸ This then is perceived as an injustice sufficient in itself to legitimate secession from China, even if a claim of independence as of right is not admitted.⁷⁹

However, before considering further the question of remedial right theory it is worth turning to consider events in the aftermath of the Seventeen-Point Agreement.

3.4 The Aftermath and Impacts of the Seventeen-Point Agreement

Following the conclusion of the Seventeen-Point Agreement, Chinese troops entered Lhasa in September 1951,⁸⁰ and China remains in control of Tibet more than fifty years later. Initially the Dalai Lama and his government remained in place,⁸¹ as provided for by the Agreement, as indeed did the traditional political economy. Further, the economic system, based on feudalism, remained intact.⁸² Nevertheless, Chinese policy was directed towards the reform of the Tibetan social system even if this was, at least notionally, to be implemented by the Tibetan local government under the principles of autonomy referred to in the Agreement.⁸³

Within three months of the occupation, Chinese forces in Lhasa alone numbered 20,000 troops, while at the same time Tibetans received assurances of religious freedom, new hospitals, schools and roads.⁸⁴ Despite such assurances, resistance to

⁷⁸ See van Walt van Praag, note 6 above, 155. See in this context Article 51 of the 1969 Vienna Convention on the Law of Treaties, note 76 above.

⁷⁹ See Moore M, 'Introduction: The Self-Determination Principle and the Ethics of Secession' in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 1-13, 11 regarding remedial right theorists. See also section 6.2 below. If Tibet is a part of China then China is entitled to use force to quell civil strife: cf the situation if Tibet were not a part of China – note 76 above.

⁸⁰ Avedon, note 74 above, 37.

⁸¹ The Dalai Lama returned to Lhasa on 23 July 1951: Goldstein (1989), note 2 above, 798.

⁸² Goldstein (1994), note 2 above, 92.

⁸³ See Articles 3 and 4; also Information Office of the State Council of the People's Republic of China, note 65 above, 3-4.

⁸⁴ Avedon, note 74 above, 37.

the Han Chinese quickly manifested itself, through posters, propaganda and marches.⁸⁵ The resistance led to the ousting of the two Tibetan co-prime ministers, under pressure from the Chinese. This amounted to interference by China in the political system of Tibet, and is an example of violation by the Chinese of the terms of the Seventeen-Point Agreement.⁸⁶

In spite of the occupation the formal institutions of Tibetan administration were little altered, on the surface, in the years immediately following the Agreement. However, George Ginsburgs and Michael Mathos note certain apparent changes. First, moves were made to improve accessibility of the people to the Dalai Lama, thus divesting him of divinity, prestige and authority, and at the same time channels of communication between the Dalai Lama and the conventional administration were broken. Secondly, the Chinese authorities attempted to extend the control of the secular authorities over the ecclesiastical court. Thirdly, the Chinese authorities adopted the policy of building up the stature of the Panchen Lama, weakening the Dalai Lama's position.⁸⁷

These changes, too, breached the Seventeen-Point Agreement, and another early breach was evidenced by an economic crisis within nine months of the occupation. The People's Liberation Army took from the civilian population what it required, and with a second demand for 2,000 tons of barley the Chinese Army in Lhasa broke the back of the capital's economy, causing spiralling inflation and the possibility of

⁸⁵ Grunfeld, note 4 above, 115.

⁸⁶ See Grunfeld, note 4 above; also Phuntsok Tashi Taklha, 'Historical Sino-Tibetan Relations, 1949-1951 and the Seventeen-Point Agreement', Paper presented to the Potomac Conference, 5-6 October 1992, *Sino-Tibetan Relations: Prospects for the Future* <<http://www.columbia.edu/cu/lweb/indiv/area/tibet-potomac/historical/taklha.html>>, accessed 8 August 2005.

⁸⁷ Ginsburgs and Mathos, note 66 above, 170-171.

famine.⁸⁸ This directly breached Article 13 of the Seventeen-Point Agreement, whereby the People's Liberation Army 'will also be fair in all buying and selling and will not arbitrarily take even a needle or thread from the people'.⁸⁹ Not all reforms introduced, though, were unpopular with the general population and initial efforts were made to eliminate 'the more objectionable survivals of feudal practices in Tibet'.⁹⁰

Opposition within Tibet to the occupation brought about a swift integration of the Tibetan Army into the People's Liberation Army.⁹¹ The continuing opposition to China's attempt to control Tibet through a puppet government led to China deciding to intervene directly in the administration of Tibet, and the Chinese Communist Party thus decided to supersede the Seventeen-Point Agreement. The 1954 Constitution adopted by the People's Congress formally abolished the autonomous position of Tibet specified in the Agreement, and the Chinese State Council adopted a resolution to further integrate the administration of Tibet with that of the People's Republic of China. Consequently the Preparatory Committee for the Autonomous Region of Tibet (PCART) was set up to prepare Tibet for assimilation into the administrative framework of the Chinese People's Republic.⁹²

⁸⁸ Avedon, note 74 above, 38.

⁸⁹ This wording itself echoes the words of Heinrich Himmler in a speech to SS officers: 'We have no right to take a single *pfennig* off property confiscated from Jews. Since the very beginning I have decreed that any SS man who took even a *mark* would be condemned to death' – Himmler H, *Discours secrets* (Paris: Gallimard, coll. 'Folio histoire', 1978) 167, quoted in Finkelkraut A, *In the Name of Humanity: Reflections on the Twentieth Century* (London: Pimlico, 2001) 53. Thus the words of the Nazi are echoed by the Communist, two totalitarian regimes expressing a similarity of outlook. The aims of the one, racial dominance; the other, the subordination of the individual to the community – the two regimes providing 'two radically antagonistic versions of history': Finkelkraut, *ibid*, 63.

⁹⁰ Ginsburgs and Mathos, note 66 above, 171.

⁹¹ Avedon, note 74 above, 38; Ginsburgs and Mathos, note 66 above, 173.

⁹² Avedon, note 74 above, 38-41; Grunfeld, note 4 above, 118; van Walt van Praag, note 6 above, 160-161.

3.4.1 *The Collapse of Tibet as a State*

The Preparatory Committee for the Autonomous Region of Tibet was established on 9 March 1955. The intent was that the Committee would gradually assume greater responsibility for the governance of Tibet. Its remit was to enhance industrial development, promote class cohesion and education, and in addition to protect freedom of religion and monasteries and 'to guard against excessive zeal in the imposition of reforms'.⁹³ Despite the direct intervention of China in Tibet, the intent of the Central Government was that Tibet would ultimately be eligible for regional autonomy,⁹⁴ as indicated by the title of the Committee itself.

The Committee, under the chairmanship of the Dalai Lama, was intended to be the agency of administration in Tibet, but at the same time steps were taken to ensure Peking held an effective absolute majority on the Committee, even though on the Committee Tibetans substantially outnumbered Han Chinese. There was ongoing resistance to Chinese authority within Tibet, which caused slow progress in the inauguration of the Committee and there was monastic opposition, for instance, to the introduction of secular education. Communist groups started operating within Tibet and power became concentrated in Chinese-dominated organisations sanctioned by PCART and therefore ostensibly by the Dalai Lama as Chairman of that Committee. The effect of the Committee was direct subversion of Tibet's government.⁹⁵

Opposition within Tibet persisted, and in February 1957 Mao Zedong stated that Tibet was not yet ready for democratic reforms, that these had not been carried out as yet and that they would not be proceeded with during the upcoming five-year plan. Han

⁹³ Grunfeld, note 4 above, 118.

⁹⁴ Ginsburgs and Mathos, note 66 above, 176-177; Ginsburgs G and Mathos M, 'Tibet's Administration During the Interregnum, 1954-1959' (1959) 32(3) *Pacific Affairs* 249-267, 249-251.

⁹⁵ Ginsburgs and Mathos, note 94 above, 253-258; Avedon, note 74 above, 43.

personnel in Tibet were to be reduced. Nevertheless the situation continued to deteriorate and Tibetan uprisings and discontent continued as violence and repression escalated. China endeavoured to secure its dominant position in Tibet following repeated uprisings in 1958, for example in June of that year setting up in Tibet a branch of the Chinese People's Supreme Court and Procuracy, and tightening the Chinese military grip in the face of ongoing guerrilla warfare.⁹⁶

In the attempt to put down the opposition, repressive action was taken by the People's Liberation Army, particularly in the province of Kham. Entire villages were obliterated, monasteries were destroyed and public executions were carried out to intimidate the population. Monasteries were principal targets: 'Monks were compelled to publicly copulate with nuns and desecrate sacred images before being sent to a growing string of labor camps in Amdo and Gansu.'⁹⁷ The repression exerted by the People's Liberation Army caused Tibetans to flee from the east towards Lhasa, and it is against this background of escalating violence that the events of March 1959 unfolded.

3.4.2 The Flight of the Dalai Lama and the Chinese Response

On 10 March 1959, a spontaneous protest broke out in Lhasa following an influx of refugees and increasing tension in the capital. The protesters that day gathered in thousands outside the Norbulingka, the summer residence of the Dalai Lama.⁹⁸ In the course of the protest a meeting resolved to renounce the Seventeen-Point Agreement

⁹⁶ Ginsburgs and Mathos, note 94 above, 259-261; Avedon, note 74 above, 47.

⁹⁷ Avedon, note 74 above, 48. See also Phuntsok Tashi Taklha, note 86 above, 6, and section 5.4 below regarding religious oppression.

⁹⁸ The estimate as to the number of the crowd varies. Grunfeld refers to a crowd between 10,000 and 30,000, note 4 above, 134; Avedon, note 74 above, 50 refers to an assembly of almost 30,000 people; whereas the Information Office of the State Council of the People's Republic refer to more than 2,000 people: see note 102 below.

and also to expel the Chinese from Tibet. Protests continued over several days, and in the face of rumours of an attack by the People's Liberation Army the Dalai Lama fled Lhasa at night on 17 March. The insurrection was violently suppressed by the People's Liberation Army who shelled the Norbulingka on 20 March. The Dalai Lama established a provisional government while en route to exile in India, where he arrived two weeks after leaving Lhasa. On 23 March 1959 the Chinese authorities declared martial law and Military Control Committees were established throughout Outer Tibet,⁹⁹ with the exception of Shigatse.¹⁰⁰ In the course of the fighting in Lhasa it is said that thousands of Tibetans were killed, and tens of thousands imprisoned.¹⁰¹

The Chinese version of events differs from that propounded by supporters of Tibet and the Dalai Lama, and China maintains, for example, 'that the populace was forced to gather around the palace [the Norbulingka] under threats of fines and physical punishment'.¹⁰² Nevertheless the revolt, for whatever reason, is a fact and, even though it was centred almost exclusively on Lhasa and the surrounding region, China's response extended to the entirety of Outer Tibet. In addition to the establishment of martial law and the Military Control Committees, 'On 28 March the State Council dissolved the Tibet Local Government, elevating PCART "during the period of the Dalai Lama's abduction," while the eighteen members of the body who

⁹⁹ Later, from 1965, to be known as the Tibet Autonomous Region: comprising the Tibetan provinces of Ü-Tsang and western Kham. This comprises less than half of historic Tibet, the remainder having been incorporated in subsisting Chinese provinces. See van Walt van Praag, note 6 above, 264 note 2.

¹⁰⁰ The base of the Panchen Lama, to whom Peking turned, in the absence of the Dalai Lama, 'to bolster its image of Tibetan collaboration': Avedon, note 74 above, 222.

¹⁰¹ See, for example, Grunfeld, note 4 above, 134-139; Yan Jiaqi, 'Federalism and the Future of Tibet' in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 107-120, 107; Song Liming, note 71 above, 63; Ginsburgs and Mathos, note 94 above, 261-262; van Walt van Praag, note 6 above 162-163; Avedon, note 74 above, 221-222; and Phuntsok Tashi Taklha, note 86 above, 6-7.

¹⁰² Grunfeld, note 4 above, 137. See also 'Tibet – Its Ownership and Human Rights Situation', note 55 above, Part One, section II: 'the rebels coerced more than 2,000 people to mass at Norbu Lingka'. See generally Part One, section II for the Chinese version of 'Origins of So-Called "Tibetan Independence"'.

fled to India were officially relieved of their posts and replaced.’¹⁰³ Thus did Tibet forfeit its autonomy.¹⁰⁴ At the same time the Dalai Lama makes the point that the Chinese had abrogated the Seventeen-Point Agreement, and therefore that Tibet repudiated that Agreement.¹⁰⁵

The position subsequent to the events of March 1959 appears to be thus:

1. De facto Tibetan independence ceased in 1951 by virtue of the Seventeen-Point Agreement. Further, no country had recognised *de jure* Tibetan independence.¹⁰⁶
2. Such autonomy as was granted to Tibet by the Seventeen-Point Agreement ceased in March 1959.
3. China increased its direct control over Tibet following the insurrection.

These points raise issues of sovereignty, which will be considered below in Chapter 4. The immediate result, though, of the 1959 insurrection was a crackdown by the Chinese authorities and total military conquest by the People’s Liberation Army.¹⁰⁷

3.4.3 Severe Measures in Tibet and the International Response

The Chinese response to the revolt and the departure of the Dalai Lama was one of repression. All unauthorised movement was banned and, in addition, work committees were created to control the populace. Reforms were commenced based on class division, and redistribution of possessions instituted; land reforms were implemented, and ‘[c]lass struggle was the crucible in which the order of the future

¹⁰³ Grunfeld, note 4 above, 139.

¹⁰⁴ Song Liming, note 71 above, 63.

¹⁰⁵ International Commission of Jurists, note 5 above, 99.

¹⁰⁶ See in this context, for example, note 28 above and related text.

¹⁰⁷ Ginsburgs and Mathos, note 94 above, 263.

was to be forged'.¹⁰⁸ Re-education through *thamzing*¹⁰⁹ took place, as elements of the population were set against each other in a people's revolution.¹¹⁰

The aristocracy and the monasteries were deprived of their rights and privileges in 1960 and a commune system was introduced as Tibet was communised. Hundreds of prisoners had been transported from Lhasa towards the end of 1959, and prison gulags, or forced labour camps, were established. As collectivisation was pursued, famine and starvation was prevalent in the period from 1959 to 1963: not necessarily attributable directly or solely to collectivisation, as Tibetan harvests were either consumed by the People's Liberation Army or were shipped out of Tibet into 'the motherland' to ease hunger there. Thus for various reasons food needed in Tibet was not available to Tibetans.¹¹¹

In addition to the confiscation of food, Chinese authorities confiscated Tibetans' wealth and belongings.¹¹² Although resistance continued in Tibet, on a guerrilla basis, many Tibetans gave up the struggle and an exodus began as a result of Chinese suppression. Between March 1959 and March 1962, 'more than sixty thousand fled Tibet for Nepal and India'.¹¹³ During the Cultural Revolution,¹¹⁴ tens of thousands

¹⁰⁸ Avedon, note 74 above, 228.

¹⁰⁹ Public 'struggle' sessions, enabling 'the accused himself, "with the help of his revolutionary brothers", [to cleanse] his mind of reactionary thoughts': *ibid* 229.

¹¹⁰ *Ibid* 222-230.

¹¹¹ *Ibid* 231-237; Phuntsok Tashi Taklha, note 86 above, 7.

¹¹² Phuntsok Tashi Taklha, *ibid*.

¹¹³ Yan Jiaqi, note 101 above, 107. This figure is not definitive: Avedon (note 74 above, 90) comments that by 1966 'settlements harboring almost 60,000 people had sprung up throughout India, Nepal and Bhutan'; Goldstein ((1989), note 2 above, 825) refers to approximately 80,000 Tibetans fleeing in the two years following the Dalai Lama's exile.

¹¹⁴ Launched by Mao Zedong in 1966 to secure Maoism as China's dominant ideology and to eliminate political opposition. 'The Cultural Revolution caused unparalleled destruction throughout the PRC and especially Tibet, where the Chinese authorities were clearly intent on wiping out Tibetan culture': Tibet Information Network, *Unity and discord. Music and politics in contemporary Tibet* (London: Tibet Information Network, 2004) 46. The era may be seen as a dynamic whereby 'the minorities [as being backward and feudal] could be completely assimilated into an ideal of a modern, socialist ([Han] Chinese) PRC': *ibid* 44.

more left the devastation that enveloped Tibet.¹¹⁵ Indeed this migration continues to this day.

The reaction of the international community to these events has been limited, if not muted. No United Nations General Assembly resolution succeeded until 1959 and only three in all have to date been passed.¹¹⁶ It is pertinent to consider why the international community did not react more positively than it did, not just to the events of 1959 but also to the incursion in 1950 and the inception of the Seventeen-Point Agreement – in essence why Tibet failed to harness the support of the international community, and in particular the unequivocal support of the major powers.

Three principal reasons can be seen to be of relevance in this regard. First, Tibet had pursued an insular policy, making little effort to ‘join the family of nations’ and making efforts to keep foreigners out of Tibet.¹¹⁷ The result was that Tibet was almost a mythic entity, instead of a focus of international attention. Secondly, the political self-interest of bordering states and major powers not anxious to oppose or provoke

¹¹⁵ Yan Jiaqi, note 101 above, 107.

¹¹⁶ United Nations General Assembly Resolutions 1353 (XIV) in 1959, 1723 (XVI) in 1961 and 2079 (XX) in 1965.

¹¹⁷ See, in this context, Hedin S, *Central Asia and Tibet: Towards the Holy City of Lhasa*, Vols I and II (Delhi: Low Price Publications, 1997) (first published 1903), for example, and his problems travelling in Tibet, especially the impossibility of reaching Lhasa; cf Harrer H, *Seven Years in Tibet*, translation by Richard Graves (London: Rupert Hart-Davis and The Book Society, 1953). Note also references by Hedin to the influence of Chinese *ambans* in Tibet in 1907 in Hedin S, *A Conquest of Tibet* (New York: E P Dutton & Co, Inc, 1934): at 309 he refers to his ‘caravan escorted by Tibetan horsemen, upon orders from the high Chinese Mandarins in Lhasa, Tang and Lien’; and at 352 to the fact that a route ‘had been closed to me by the Chinese ambans in Lhasa, Tang Darin and Lien Darin and by the Tibetan authorities’. Foreigners were also kept out of Tibet after 1950; in 1972 Philippe Ardant referred to Tibet, *inter alia*, as being a ‘province’ that ‘foreign diplomats may not visit, and this has been the case for several years’: Ardant P, ‘Chinese Diplomatic Practice during the Cultural Revolution’ in JA Cohen (ed.), *China’s Practice of International Law: Some Case Studies* (Cambridge, MA: Harvard University Press, 1972) 86-128, 95. Robert Sloane comments that ‘the isolation Tibet’s government had self-consciously cultivated to shield Tibet from foreign domination proved the principal reason that Tibet found itself unable to achieve political recognition as a modern nation-state – and thus powerless to resist foreign domination by communist China’: Sloane, note 50 above, 136. Thus the isolationist history of Tibet is a root cause of the problems it faced in 1950, as by virtue of this policy most states had no reason to give any consideration to Tibet’s status: Sloane, *ibid*, 142, 149.

the incipient major power of China – and both Communists and Republicans in China were of one view so far as Tibet was concerned.¹¹⁸ Thirdly, what might be termed ‘events’ on the international stage,¹¹⁹ or accidents of history. At the time the Tibetan crisis came to prominence in 1950 and 1951, the USA was already involved in hostilities in the Far East, the Korean War having broken out in June 1950.¹²⁰ The other major power that might have intervened, Britain, which China certainly viewed as having had imperialist designs on Tibet, was withdrawing from the region, having granted India independence in 1947. Britain was not in a position to give Tibet direct assistance or support, and also was not in a position to take a stance opposed to that of India. To do so would inevitably have been seen as rekindling regional imperialist designs.¹²¹ Tibet was thus reliant on ‘a ground swell of popular sympathy’, not only at that time but subsequently.¹²²

Of the United Nations General Assembly resolutions, the first, in October 1959, some seven months after the insurrection, called for ‘respect for the fundamental rights of the Tibetan people and for their distinctive cultural and religious life’, and expressed concern that ‘fundamental human rights and freedoms of the people of Tibet have

¹¹⁸ See, for example, note 50 above regarding political self-interest of India; also note 63 above with reference to both India and Nepal.

¹¹⁹ To borrow the word from former Conservative Prime Minister Harold Macmillan, who when asked, in a different context, what can most easily steer a government off course, apocryphally replied, ‘Events, dear boy, events.’ Macmillan was British Prime Minister from 1957 to 1963.

¹²⁰ The USA was therefore ‘otherwise occupied’, with forces committed elsewhere. It is also noteworthy that, in both the Korean war and the later Vietnam war, the American and Chinese forces were not in direct opposition. Had the USA seen fit to intervene in Tibet there would have been no buffer state acting as a proxy for direct US-China confrontation. The war between major powers would not have been limited, and potentially would have been disastrous for both. Viewing global implications of such a conflict strategically, realism would implicitly dictate a higher level of threshold for conflict, and therefore that in any event the USA would not have directly intervened on behalf of Tibet against China. See also Ignatieff M, *Empire Lite: Nation-building in Bosnia, Kosovo and Afghanistan* (London: Vintage, 2003) 111, who argues that ‘America will not risk military confrontation with Russia or China simply because the human rights of their subject populations are at risk.’

¹²¹ Britain thus ‘deferred to the newly independent government of India, which it viewed as the inheritor of any strategic interests in [sic] may once have maintained in Tibet’: Sloane, note 50 above, 137.

¹²² For an example of reference to such a ground swell, see Avedon, note 74 above, 66 – in that instance, in India.

been forcibly denied them'.¹²³ In the second, the General Assembly renewed 'its call for the cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self-determination',¹²⁴ and the third similarly called for an end to practices 'which deprive the Tibetan people of the human rights and fundamental freedoms which they have always enjoyed'.¹²⁵ In addition, on 23 August 1991 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted by nine votes to seven (with four abstentions) Resolution 1991/L.19 calling on the Government of the People's Republic of China 'fully to respect the fundamental human rights and freedoms of the Tibetan people'.¹²⁶ This last-mentioned is significant as the first UN resolution on Tibet since the People's Republic replaced Taiwan as the representative of China at the United Nations in 1971.¹²⁷

Despite these resolutions, human rights abuses continued in Tibet.¹²⁸ China therefore has not complied with the resolutions and its position as a Permanent Member of the United Nations Security Council appears to give it immunity in this context,

¹²³ United Nations General Assembly Resolution 1353 (XIV); adopted by 45 votes to 9, with 26 abstentions.

¹²⁴ United Nations General Assembly Resolution 1723 (XVI) of December 1961; adopted by 56 votes to 11, with 29 abstentions.

¹²⁵ United Nations General Assembly Resolution 2079 (XX) of December 1965; adopted by 43 votes to 26, with 22 abstentions.

¹²⁶ Resolution E/CN.4/Sub.2/1991/L.19. In the resolution 'the Sub-Commission noted its concern at continued reports of violations of Tibetans' fundamental rights': Tibet Justice Center, Reports and Publications, 'UN Interventions' (2007)

<<http://www.tibetjustice.org/reports/un/unint2.html>>, accessed 27 February 2007.

¹²⁷ United Nations General Assembly Resolution 2758 (XXVI). See also Free Tibet Campaign, '*Tibet File No. 9 United Nations Resolutions on Tibet*' (2005)

<<http://www.freetibet.org/info/file/file9.html>>, accessed 11 August 2005. Although the 1991 resolution is of significance, the title of the Sub-Commission itself is nevertheless of import here: thus Tibet is merely seen as a minority within another state, rather than a state in its own right. As a minority within a state, Tibetans would, however, have certain rights: 'in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, . . . to use their own language' – International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, Article 27. The ICCPR contrasts rights of minorities with rights of peoples who, by virtue of Article 1, have the right to self-determination: see Sloane, note 50 above, 129-130. See Chapter 5 below with reference to the ability of Tibetans to enjoy their own culture, profess and practise their religion, and regarding the use of their own language.

¹²⁸ See Chapter 5 below; see also, for example, Phuntsok Tashi Taklha, note 86 above, 7.

reinforcing its claim that Tibet is an internal Chinese matter not brooking external interference. Member states of the United Nations have not been prepared to oppose China over the issue of Tibet and realism in the form of political self-interest can be seen to have prevailed.

3.5 Issues

In the course of this chapter certain key issues have become identifiable. These relate to the fluidity of political and legal identity, considerations of autonomy, the relevance of the remedial right theory to Tibet, and also the physical movements of people. These will now be considered in turn.

3.5.1 Fluidity of Political and Legal Identity

While, for China, Tibet is seen to be an integral part of the Chinese state, and thus Tibetans are seen as Chinese citizens having, for example, the benefit of Chinese passports, but also having obligations to China, as exemplified by the integration of Tibetan troops into the national defence forces,¹²⁹ this is not the Tibetan outlook. There is a distinct Tibetan identity, having its roots first and foremost in identity with Buddhism, what indeed may be termed Tibetan Buddhism.

The Tibetan identity is not just, therefore, to Tibet, but to a religion, and religion is effectively anathema to Communism,¹³⁰ which in turn holds sway in China. It is through Communism that China finds a pretext for its presence in Tibet:¹³¹ to safeguard the material needs of the populace – an emancipation of the people from feudal dominance. For China, self-determination emphasises the territorial integrity of

¹²⁹ Article 8 of the Seventeen-Point Agreement; see also section 3.4 above.

¹³⁰ Although, by Article 36 of the 1982 Chinese Constitution, all citizens of the People's Republic of China are professed to enjoy freedom of religious belief.

¹³¹ In addition to arguments relating to unification and unity of the state.

the state, but at the same time it is this concept of integrity that has brought an end to the de facto independence of Tibet, leading to discontent and uprisings.

Thus the legal identity of the Tibetan has changed. Although international resolutions refer to ‘the Tibetan people’,¹³² no step has been taken to recognise the independence of the Tibetan nation, and whereas, prior to the Seventeen-Point Agreement, Tibet was perceived to be independent,¹³³ this is clearly not the case now. This ongoing situation is recognised by the Dalai Lama, who has sought a solution to the Sino-Tibetan relationship based on autonomy rather than on independence.¹³⁴

The position in respect of political identity is somewhat different. The political identity can be seen to be fluid, in that the power of the religious sovereign waned following the Seventeen-Point Agreement, as outlined above.¹³⁵ Yet personal loyalty to the Dalai Lama is evident following his exile to India in 1959. It is reflected in the fact that tens of thousands of Tibetans have followed him into exile, and in the warmth and enthusiasm with which his representatives were greeted on visits to Tibet

¹³² United Nations General Assembly Resolutions 1353 (XIV) in 1959, 1723 (XVI) in 1961 and 2079 (XX) in 1965; also Resolution 1991/L.19 of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. See section 3.4.3 above.

¹³³ See, for example, the material cited in note 20 above. See also McCabe DA, ‘Tibet’s Declarations of Independence’ (1966) 60(2) *American Journal of International Law* 369-371 and the references to Tibet’s Capacity to Enter into International Relations at section 4.4.2.4 below. David McCabe argues (at 371) that by 1914 Tibet had ‘expressly declared its independence at least twice’: in the Urga Treaty with Mongolia of 1912 (the existence of which treaty is disputed: see section 4.4.2.4 below) and in the opening brief at the Simla Conference. However, while commentators may have perceived Tibet to be independent, states appear to have taken a contrary view and, for instance, at Simla the British view did not confirm a *de jure* Tibetan sovereignty. Article 2 of the Simla Convention remains of difficulty to an argument for Tibetan independence from China prior to 1950, despite the contention of the International Commission of Jurists that ‘Tibet was an independent state as of 1950’: International Commission of Jurists, note 5 above, 15; also Sloane, note 50 above, 131. Note also the conclusion of James Crawford that Tibet was not regarded as an independent country *de jure* in 1914, which ‘has always been the British view, and it was the Chinese view in 1951’: Crawford, note 27 above, 325 (footnotes omitted).

¹³⁴ As confirmed in his speech to the European Parliament in Strasbourg on 24 October 2001, where the Dalai Lama emphasised that he has no demand for independence for Tibet, but for real autonomy: reported in, for example, Miljöpartiet de Gröna, ‘Pressconference [sic] by European Parliament Delegation for relations with the Peoples Republic of China’ (2002) <http://www.mp.se/templates/template_78.asp_Q_avdnr_E_12165_A_number_E_43908>, accessed 25 September 2005. See also Plunk RL, *The Wandering Peacemaker* (Charlottesville, VA: Hampton Roads Publishing Company, Inc., 2000) 48; and sections 3.5.2 and 6.4 below.

¹³⁵ Section 3.4.

in subsequent years.¹³⁶ Political continuity in this context reflects conflation of politics and religion; on the pure political level here there is fluidity, on the religious level there is obedience. Not, though, unchanging obedience, as within the exiled Tibetan diaspora there is by no means complete agreement upon the Dalai Lama's current negotiating position based on autonomy.¹³⁷

3.5.2 *Autonomy*

The Seventeen-Point Agreement itself refers, in Article 3, to the Tibetan people having the right to exercise regional autonomy. This concept of Tibetan autonomy continues throughout the subsequent period. Even though the autonomous position of Tibet was abolished in the 1954 Chinese Constitution, the Preparatory Committee for the Autonomous Region of Tibet was established in the following year with the intent that Tibet would attain autonomy.

The Tibet Autonomous Region (TAR)¹³⁸ came into being on 1 September 1965. By Article 4 of the 1982 Chinese Constitution, it is provided that 'in areas where people of minority nationalities live in compact communities . . . organs of self-government are established for the exercise of the right of autonomy'. Clearly the TAR is one such area. Section 6 of the Constitution, Articles 112 to 122, deals with the organs of self-government of national autonomous areas. The relevant issue is therefore one of what is meant by 'autonomy', in circumstances where, according to Article 4 of the Constitution, each national autonomous area is an inalienable part of the People's Republic.

¹³⁶ See Avedon, note 74 above, Chapter 11.

¹³⁷ See, for example, Plunk, note 134 above, 72.

¹³⁸ As to the extent of the TAR, which effectively comprises political rather than ethnographic Tibet, see note 99 above and Grunfeld, note 4 above, 8; also Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition (Philadelphia: University of Pennsylvania Press, 1996) 423-424.

Section 6 of the 1982 Constitution in part provides the answer and gives a considerable margin of interpretation to the central authorities. Thus by Article 115, the organs of self-government of the autonomous regions ‘exercise the right of autonomy within the limits of their authority as prescribed by the Constitution, the law of regional national autonomy and other laws, and implement the laws and policy of the state in the light of the existing local situation’. Further, Article 116 provides, inter alia, that the ‘autonomy regulations and specific regulations of autonomous regions shall be submitted to the Standing Committee of the National People’s Congress for approval before they go into effect’. Central authority therefore dominates, and there is perhaps just one area in which there is, on the face of the Constitution, real autonomy. By Article 119:

The organs of self-government of the national autonomous areas independently administer educational, scientific, cultural, public health and physical culture affairs in their respective areas, sort out and protect the cultural legacy of the nationalities and work for the development and prosperity of their cultures.¹³⁹

In addition, by Article 118, the organs of self-government have authority to administer local economic development, albeit under the guidance of state plans. That article further provides that the state shall give ‘due consideration to the interests of [autonomous] areas’ when ‘developing natural resources and building enterprises’ in such areas.

An autonomous area may be defined as comprising ‘a region within a country [that] has its own government and decides issues of local nature, leaving national issues to

¹³⁹ Emboldened text in original.

the national government'.¹⁴⁰ It is by no means clear that the TAR can properly be described as being in possession of autonomy, noting both the theory of the wording of the Constitution and also the practice of governance within the TAR.¹⁴¹ The Dalai Lama's view is that Tibet should have autonomy, and China views the TAR as being autonomous; the question thus becomes one of how to construe meaningful autonomy, and effectively one of internal self-determination in a scenario where, to date, international norms have failed to resolve the Sino-Tibetan relationship.¹⁴² The treatment of Tibetans by China becomes relevant and this leads back to issues surrounding self-determination, and in particular the remedial right theory.

3.5.3 The Relevance of the Remedial Right Theory to Chinese Tibet

The utilisation of the remedial right, or just cause, theory of self-determination is significant in respect of Tibet, although it apparently sets a higher threshold with regard to self-determination than does the choice theory of self-determination, which latter theory places greater emphasis on internal self-determination or autonomy through referendum or plebiscite. Geopolitical events may influence issues such as those that surround self-determination, and political realities may bring about a situation where thresholds for self-determination in any given state are increased or reduced. Increasing globalisation is of relevance, a process characterised as 'the intensification of worldwide social relations which link distinct localities in such a

¹⁴⁰ Plunk, note 134 above, 46.

¹⁴¹ See above, this chapter, and also Chapter 5, below, on human rights.

¹⁴² See note 134 above, and related text with reference to the Dalai Lama's view. Also see generally section 6.4 below in respect of elements of autonomy and the divergence between autonomy as practised in the TAR and the Dalai Lama's genuine autonomy proposal.

way that local happenings are shaped by events occurring many miles away and vice versa'.¹⁴³

According to remedial right theorists, secession will be legitimated if it is required to remedy an injustice.¹⁴⁴ Injustices against Tibet and Tibetans, referred to in this chapter, include the military invasion of Tibet in 1950, the threats to the Tibetan delegation during the negotiation of the Seventeen-Point Agreement, the breaches by the Chinese administrators of the Seventeen-Point Agreement, and the repression by the People's Liberation Army subsequent to the Seventeen-Point Agreement. Generally, injustices will be considered in greater depth in Chapter 5 below, but the fate of the people of Tibet has been noted as a reminder 'of the injustice and violence that can befall minorities who are given no legal and peaceful means to exit a state that does not, to say the least, treat their interests equally'.¹⁴⁵

If the injustices suffered by Tibetans are sufficient to justify secession,¹⁴⁶ then equally a case for meaningful autonomy may be made. The burden of proof imposed is high,

¹⁴³ Giddens A, *The Consequences of Modernity* (Stanford, CA: Stanford University Press, 1990) 64. See also Twining W, *Globalisation and Legal Theory* (London: Butterworths, 2000) 4. 'In the last three decades, transnational interactions have shown a dramatic intensification, from globalization of production systems and financial transfers, to worldwide dissemination of images through the mass media and communication technologies, and to mass translocation of people, as tourists, as migrant workers or as refugees': Santos B de S, *Toward A New Legal Common Sense: Law, Globalization, And Emancipation*, Second Edition (London: Butterworths LexisNexis, 2002) 165, for whom globalisation is 'the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local' (178).

¹⁴⁴ See section 2.4.3 above; also section 6.2.2 below.

¹⁴⁵ Norman W, 'The Ethics of Secession as the Regulation of Secessionist Politics' in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 34-61, 42.

¹⁴⁶ The fact that injustices have been perpetrated on the Tibetan people has been admitted by the Chinese Communist hierarchy. For instance, in 1980 Hu Yaobang, General Secretary of the Chinese Communist Party, during an inspection visit to Tibet, publicly conceded that there had been maladministration in Tibet and that Tibetan people had been subjected to suffering, also that almost thirty years of Chinese rule had produced no significant improvement in the people's livelihood: see van Walt van Praag, note 6 above, 175 and the sources cited in the notes appurtenant thereto.

and it is for this reason that injustices perpetrated against Tibet and its populace will be focused upon.¹⁴⁷

3.5.4 Physical Movement of Peoples

It is in the physical movement of peoples that we can see some evidence of the injustice referred to. This movement has manifested itself in various ways.

First it can be seen in the very exile of the Dalai Lama in March 1959, in fear of attack by the People's Liberation Army – a fear born out of the manner in which the Chinese had treated the Tibetans subsequent to the 1950 invasion. This exile has proved permanent, unlike the escape of the Thirteenth Dalai Lama to India in 1910 and the temporary exile of the Fourteenth Dalai Lama from Lhasa to Yatung in 1950.

The Dalai Lama's exile has been followed over the decades by a migration of Tibetans, many to follow the Dalai Lama to India and most due to the repressive treatment received from the Chinese or the conditions pertaining in Tibet as a result of Chinese governance.¹⁴⁸ Escalating violence prior to March 1959 led to an exodus from the country towards Lhasa, and subsequent instances of violence and injustices have led to the flight from Tibet itself.¹⁴⁹

There is a further physical movement that also evidences injustice to the Tibetans, and that is the influx of Han Chinese into Tibet subsequent to 1950. There has been massive immigration especially since 1983. In one estimate Han Chinese outnumber Tibetans not only within the traditional region of Tibet but also in the TAR itself; in

¹⁴⁷ See Chapter 5 below. The words of Amitai Etzioni echo in the Tibetan context: 'Self-determination movements gained support because they fought against oppression . . .' – Etzioni A, 'The Evils of Self-Determination' (1992) 89 (Winter) *Foreign Policy* 21-35, 35.

¹⁴⁸ See, for example, sections 3.4.1 and 3.4.3 above, and Chapter 5 below.

¹⁴⁹ See Grunfeld, note 4 above, 190-191; also Hannum, note 138 above, 425, referring to the devastating impact of the Cultural Revolution, note 114 above, particularly on Tibetan religion and culture.

Lhasa it has been said that Tibetans are outnumbered three to one by Chinese.¹⁵⁰ The impact of the population influx into Tibet is to dilute the indigenous population, to drive it out, to take work, to contribute to food shortages: in short, to change the nature of Tibet.

3.5.5 Final Words

These issues are all of significance in the context of self-determination for Tibet, but they also bear on another concept, that of sovereignty. I shall now consider that topic, as it may be sovereignty rather than self-determination that has the greatest bearing on the Sino-Tibetan relationship.

¹⁵⁰ Hannum, note 138 above, 426. See also section 4.4.2.1 below.

4 Issues Pertaining to Sovereignty and Tibet

4.1 Introduction

In this chapter I aim to examine issues surrounding sovereignty and territorial integrity, with particular reference to the Sino-Tibetan relationship. I will consider the criteria applicable to statehood, look into its various elements, and also have regard to changing concepts in this context. This will lead on to a discussion of sovereignty in respect of Tibet, analysed from both Chinese and Tibetan views and taking into account world views and perceptions as to Tibet and sovereignty. I will apply the concept of sovereignty to Tibet as at the start of the twenty-first century. The aim of the chapter is to determine whether sovereignty rather than self-determination has the greatest potential to unlock the Sino-Tibetan dilemma, and thus I will conclude by a determination as to whether the changing concept of sovereignty can assist in resolving questions of importance regarding Tibet: questions which relate to key issues already identified with regard to the fluidity of political and legal identity, considerations of autonomy, the relevance of the remedial right theory to Tibet, and also the physical movement of peoples.

4.2 Sovereignty

4.2.1 As Criteria for Statehood

The concept of ‘sovereignty’ as understood today represents the entirety of international rights and duties that are recognised by international law to be residing in what may be termed ‘an independent territorial unit’, in other words the state. In

essence, therefore, sovereignty is a description of statehood,¹ and the criteria of statehood are laid down by international law.² By Article 1 of the Montevideo Convention on Rights and Duties of States, ‘The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.’³ These four criteria, while not necessarily exhaustive, tend to be adopted in substance by jurists,⁴ and they will be considered in turn below as reflecting ‘sovereignty’.

Sovereignty is inextricably linked with the concept of ‘territorial integrity’,⁵ which is of fundamental importance to this thesis. Certain provisions of Article 2 of the United Nations Charter evidence that both concepts are peremptory norms of international

¹ Crawford J, *The Creation of States in International Law*, Second Edition (Oxford: Clarendon Press, 2006) 32; see also *Reparation for injuries suffered in the service of the United Nations* Advisory Opinion, ICJ Reports 1949, 174, 180. Indeed, only states can be sovereign: Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition (Philadelphia: University of Pennsylvania Press, 1996) 15. However, sovereignty is not only a description of statehood, and there are various ways in which the term ‘sovereignty’, which for many scholars means more than ‘the state’, is used: see, for instance, James A, *Sovereign Statehood: The Basis of International Society* (London: Allen & Unwin, 1986) 14-22. New lines of thought on the issue of sovereignty have opened up as sovereignty has been transformed, for example, in the EU states. Questions arise as to whether sovereign states may mutate into post-sovereign states, whether sovereignty may survive within the compass of the EU, or survive devolution of power, for example within the UK. In that context issues of subsidiarity become apparent, as do issues of the politics of identity. See, for instance, MacCormick N, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 191-192 and 198, who argues for a new order transcending the sovereign state, and in turn weakening the concept of exclusive territoriality, the idea as a whole developing out of the broad idea of subsidiarity. Contrast Neil Walker, who argues that, in what is a post-Westphalian phase of sovereignty, although there are pressures on sovereignty, it is necessary to conceive of new political values and virtues flourishing ‘*through* the operation of sovereignty’, not in its absence: Walker N, ‘Late Sovereignty in the European Union’ in N Walker (ed.) *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 3-32, 31 (emphasis in original). See also section 4.3 below.

² Brownlie I, *Principles of Public International Law*, Sixth Edition (Oxford: Oxford University Press, 2003) 69.

³ 165 LNTS 19. The Convention was signed at Montevideo on 26 December 1933 and entered into force on 26 December 1934.

⁴ Brownlie, note 2 above, 70.

⁵ See, for instance, Preamble to the Constitution of the People’s Republic of China, adopted 4 December 1982; also Werner WG, ‘Self-Determination and Civil War’ (2001) 6(2) *Journal of Conflict and Security Law* 171-190, 173 and the references to UNGA Resolutions 1514 (XV) of 14 December 1960 and 2625 (XXV) of 24 October 1970 thereat. While sovereignty is generally associated with the territory of a state, Cezary Mik distinguishes it from the principle of territorial integrity in the context of extradition and asylum: Mik C, ‘State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context’ in N Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 367-400, 377-378.

law.⁶ Article 2(1) reads: ‘The organization is based on the principle of sovereign equality of all its Members’, while Article 2(4) states: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.’⁷

4.2.1.1 A Permanent Population

The first of the four criteria for statehood laid down by Article 1 of the Montevideo Convention on Rights and Duties of States is that the state should possess a permanent population. Consequently a permanent population is necessary for statehood, and whereas this presupposes a permanent community⁸ there is nothing that precludes the population of a state, either in part or in whole, being nomadic, ‘although one may require that the areas within which they move are defined when such a State is established, if there is no other fixed population’.⁹

⁶ Certain overriding principles of international law exist, forming a body of *jus cogens*, rules, rights or duties that may be termed fundamental, inalienable or inherent: Brownlie, note 2 above, 488. That this is so is confirmed by Article 53 of the Vienna Convention on the Law of Treaties of 1969: ‘For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’: Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. See also Crawford, note 1 above, 100-101. However, not only are sovereignty and territorial integrity peremptory norms of international law, so is the right to self-determination, the principle of which is recognised by international law: Crawford, *ibid*, 127, 447; see also section 2.4.1 above. With reference to non-self-governing territories, it has been asserted that ‘administering States are *ipso facto* not sovereign with respect to their Chapter XI territories, i.e. that the effect of colonial self-determination is to displace sovereignty rather than to qualify its exercise’: Crawford, *ibid*, 613. Thus, where applicable, the norm of self-determination has overridden the norm of sovereignty. Of course, in addition, states can give their consent to restrict their sovereign rights, for example permitting foreign troops on to their territory or allowing a foreign army to establish a military base on their territory. While external self-determination may be seen as a peremptory norm, this is not the case with internal self-determination, and, for example, in any event a state may give away power to exploit natural resources within its territory.

⁷ Brownlie I and Goodwin-Gill GS, *Basic Documents on Human Rights*, Fourth Edition (Oxford: Oxford University Press, 2002) 3.

⁸ Brownlie, note 2 above, 70.

⁹ Detter I, *The International Legal Order* (Aldershot: Dartmouth Publishing Company Limited, 1994) 38-39.

While Article 1 requires the state to have a permanent population, this is not a provision that relates to the nationality of that population. Nationality thus depends upon statehood and not the reverse.¹⁰ Finally, in this regard, no minimum is necessary in the context of a permanent population: even small states, such as Nauru¹¹ and San Marino,¹² are acknowledged as states, and thus to be sovereign.¹³

4.2.1.2 A Defined Territory

By the second criterion in question the state must have a defined territory, and in their very nature states are territorial entities. States must have boundaries, and therefore territory, but this territory may be small.¹⁴ The existence of fully defined frontiers is not a requirement and it is in fact feasible that a state can exist without territory: as an instance, before the 1929 Lateran Treaty gave it territory, the Holy See was treated as a state.¹⁵ Nevertheless it is clear that a state must comprise ‘a reasonably stable political community and this must be in control of a certain area’.¹⁶ This point leads directly to questions of government and also to the issue of recognition of states and governments.¹⁷

¹⁰ Crawford, note 1 above, 52.

¹¹ Nauru was admitted to the United Nations Organisation on 14 September 1999, and at 2005 its population is estimated to be approximately 13,000.

¹² San Marino was admitted to the United Nations Organisation on 2 March 1992, and at 2005 its population is estimated to be approximately 29,000.

¹³ Crawford, note 1 above, 46-47.

¹⁴ Nauru, for example, comprises 21 square kilometres.

¹⁵ Detter, note 9 above, 37, 136.

¹⁶ Brownlie, note 2 above, 71.

¹⁷ See respectively sections 4.2.1.3 and 4.2.2 below. Recognition, though, is not an *element* of statehood, and indeed a state can meet required elements of statehood without being recognised, for example Israel is not recognised by the majority of Arab states. Equally a state may be recognised by other states in the absence of certain criteria of statehood; for instance, the recognition of successor states to the former Yugoslavia particularly by member states of the European Community on 6 April 1992, although the criteria of statehood were not fully in place, in this instance early recognition being seen ‘as a way of containing the violence and limiting the issues to be resolved’: Crawford, note 1 above, 416, also 401. See further note 20 and related text below. Recognition, not only of governments but also of states, thus has political connotations.

4.2.1.3 Government

Effective government is evidence per se of a stable political community and might be seen to be inherent in any claim for statehood. Additionally, territorial sovereignty is ‘governing power’ with regard to territory, rather than ownership.¹⁸ Effective government is perhaps best evidenced by centralised administrative and legislative bodies, yet in certain instances the existence of effective government has been seen to be ‘either unnecessary or insufficient to support statehood’.¹⁹ So far as the question of necessity is concerned, Ian Brownlie cites instances of states that have arisen before government was well organised: Poland in 1919, and also Burundi and Rwanda, states admitted to the United Nations on 18 September 1962.²⁰

As a corollary to this, James Crawford makes the well-founded observation that ‘[t]he point about “government” is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority’.²¹ Entitlement to exercise authority proved sufficient in the case of the Congo in 1960. Thus the *potential* to actually exercise authority can prove adequate to establish effective government as a necessary, but not in itself sufficient, criterion of statehood,²² for statehood itself ‘is not “simply” a factual situation. It is a legally circumscribed claim of right, specifically to the competence to govern a certain territory’.²³

¹⁸ Crawford, note 1 above, 56.

¹⁹ Brownlie, note 2 above, 71. The views of Wouter Werner are also of interest in this regard. He makes the point that, despite ineffective government in an existing state, international law still treats territorial entities as sovereign states, for example Lebanon in the 1980s; similarly, despite the transfer of considerable powers by EU states to the supranational EU, such states are still treated as sovereign states by the international community: Werner, note 5 above, 181. Werner argues that therefore sovereignty cannot be accounted for in terms of effective control or the existence of legal powers alone; rather, he sees it as a legal institution.

²⁰ Brownlie, *ibid.*

²¹ Crawford, note 1 above, 57.

²² See, in this context, Detter, note 9 above, 40.

²³ Crawford, note 1 above, 61.

4.2.1.4 Capacity to Enter into Relations with Other States

The final criterion for statehood specified by Article 1 of the Montevideo Convention on Rights and Duties of States is the capacity to enter into relations with other states. Yet such capacity is by no means exclusive to states; multinational companies, for instance, may enter into contractual relations with states. Thus it is more pertinent to equate this particular criterion for statehood with the concept of independence, which arguably is the decisive criterion for statehood.²⁴

Central to independence is a lack of foreign control exercised over the decision making of the state. Should there be foreign control, then it may be that such a state is a puppet state, which leads to difficulties in the context of recognition.²⁵ Consequently independence is the sine qua non of an established state, and is indicative of the fact that the state is not bound to accede to any authority other than international law;²⁶ indicative in essence that it is a sovereign nation. There will be prima facie evidence of statehood if, for example, the entity in question manifests evidence of independence through such as having its own executive and other organs, conducting its foreign relations through its own organs, and having its own legal system and system of courts.²⁷

The independence of an existing state is protected by the rules of international law against illegal invasion and annexation. Therefore a state may continue to exist as a legal entity for a considerable time after such an invasion and annexation, even though it lacks effective government. Conversely a new state, formed by virtue of

²⁴ See Brownlie, note 2 above, 71-72; Crawford, note 1 above, 61-62.

²⁵ See section 4.2.2 below.

²⁶ See Detter, note 9 above, 48-49.

²⁷ Brownlie, note 2 above, 72.

secession, needs to demonstrate substantial independence before it will be regarded by the international community as created.²⁸

4.2.2 *Recognition of Statehood*

In the context of recognition it is necessary to distinguish between recognition of statehood and recognition of a government of a state, and in respect of the former both declaratory and constitutive theories of recognition persist.

By the declaratory theory of recognition, recognition is perceived to be simply a declaration or an acknowledgement of a subsisting state of law and fact, legal personality of an existing state having previously been conferred by operation of law. Thus the legal effects of recognition of one state by another are limited, and a state exists regardless of whether or not it is recognised. Ian Brownlie argues that there is considerable state practice advancing the declaratory view in that unrecognised states are, for instance, subject to charges of aggression or breaches of the United Nations Charter by states that refuse to grant recognition.²⁹

According to the constitutive theory of recognition, by contrast it is the very act of recognition upon which the creation of a state depends. In other words, a state does not come into existence until it is recognised.³⁰ If the constitutive theory is accepted, then clearly recognition is of the greatest significance, yet in practice the creation of a state does not depend on acts of recognition by all other states. It is this practice that

²⁸ See Crawford, note 1 above 63.

²⁹ See Brownlie, note 2 above, 86-87; for example, charges by Arab states against Israel.

³⁰ See Detter, note 9 above 63; also Brownlie, note 2 above, 87-88. Tanja Aalberts also argues for the constitutive theory of recognition: Aalberts TE, 'The Sovereignty Game States Play: (Quasi-) States in the International Order' (2004) 17(2) *International Journal for the Semiotics of Law* 245-257, 251.

defeats the view of certain scholars that ‘recognition is constitutive, but that there is a legal duty to recognize’.³¹

This then would suggest that the declaratory theory of recognition is correct, and that therefore the legal effects of recognition are limited. Nonetheless they are significant, and can be seen to be so for instance in the non-recognition of Tibet as a state in the 1950s and subsequently. Alternatively, non-recognition of an entity as a state can be seen to be evidence of a means whereby the status quo of established territorial boundaries may be achieved, for example in respect to a claim for self-determination by a minority within a subsisting state.

It is perhaps collective recognition of a state by an organisation such as the United Nations that is of practical relevance. A state is *de facto* a state if elected to membership of that organisation, even if it is not recognised as a state by all members.³² This view aligns with the declaratory theory of recognition, in that membership of the United Nations is restricted to states, and that, by allowing a state to join, the United Nations acknowledges it is in all material respects a state as such, even though all United Nations members may not recognise the state.³³ The legal effects of this recognition though are not limited, as implied by the declaratory theory: they are significant, if only in that they permit United Nations membership and the benefits thereof, and because of the contrast evident with regard to non-recognition of other entities, those bodies that do not attain the benefits of statehood.³⁴ In all

³¹ Brownlie, note 2 above, 89; referring to the position adopted by Lauterpracht and Guggenheim.

³² As exemplified by the situation pertaining in respect of Israel.

³³ It would also be consonant with the idea that ‘statehood is legitimised by the *fact* of its existence rather than by the *act* of its recognition’: Aalberts, note 30 above, 250 (emphasis in original) – but for whose conclusion see note 30 above.

³⁴ ‘Nonrecognition by states and international organizations renders an entity that otherwise satisfies the criteria for statehood unable to exercise the associated sovereign rights, particularly the right to freely conduct its own foreign relations’: Sautman B and Dreyer JT, ‘Introduction: The Tibet Question in Contemporary Perspective’ in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics,*

practical respects the United Nations protects and promulgates the independent sovereign state, as evidenced by Article 2 of the United Nations Charter.³⁵

Recognition of statehood by other states is clearly a political decision by the recognising state, and as the existence of an effective government is one of the criteria for statehood³⁶ very often the recognition of a state will take the form of recognition of a government. This though is not always the case, and indeed non-recognition of a particular regime does not necessarily mean that the state under the rule of that regime does not qualify for statehood. For example, a coup in one state does not necessarily affect the status of that state, even though the new government may not be recognised.³⁷ Non-recognition or recognition of governments is thus perceived to be more political than that of states.³⁸

The fact that recognition of governments and states is intensely political at its root is particularly evident from the situation that followed the proclamation of the People's Republic of China in 1949. China had been a founding member of the United Nations in 1945, but by October 1949 the Republican Chinese government was confined to Taiwan, where it established a provisional capital of that government, the People's Republic holding sway over mainland China. The Republican government, though, retained China's seat at the United Nations, and in the United Nations organs, despite

Development, and Society in a Disputed Region (Armonk, New York: ME Sharpe, 2006) 3-22, 18 note 5.

³⁵ Especially Article 2.4, quoted in section 4.2.1 above.

³⁶ See Article 1 of the Montevideo Convention on Rights and Duties of States: sections 4.2.1 and 4.2.1.3 above.

³⁷ There is a distinction in international law between 'change of State personality and change of the government of the State. There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government': Crawford, note 1 above, 34 (footnote omitted). Even so, 'the continuance of even an illegal occupation for a sufficiently long time after the cessation of hostilities will lead to the extinction of the occupied State by *debellatio*: this was the case with Hyderabad': Crawford, *ibid*, 74; see also Das T, 'The Status of Hyderabad During and After British Rule in India' (1949) 43(1) *American Journal of International Law* 57-72, 72 and Eagleton C, 'The Case of Hyderabad Before the Security Council' (1950) 44(2) *American Journal of International Law* 277-302, 301.

³⁸ Brownlie, note 2 above, 90.

the fact that the People's Republic was evidently not a puppet of any other state,³⁹ but was a 'genuine revolutionary government'.⁴⁰ Other states were slow to recognise the People's Republic, during the time of the Cold War, and it was not until the mid-1970s (more than a quarter of a century after the Communist revolution in China) that the People's Republic had been recognised by a majority of states. However, by October 1971 the People's Republic of China had taken the place of the Republic of China in the United Nations General Assembly, the Republic having been expelled.⁴¹ The People's Republic had refused to take part in the United Nations so long as the Republic participated. This refusal applied to the People's Republic of China's participation in other international organisations⁴² – and the policy was formulated on the premise of avoiding a situation of 'two Chinas'.⁴³

Thus both recognition of states and governments can be seen to be of significance and it is in the forum of the United Nations that such recognition and its repercussions are manifest.

4.2.3 China and International Law

In the discussion on sovereignty up to this point, I have largely been examining the topic through the prism of the Western doctrine established at the Peace of

³⁹ 'The term "puppet State" is used to describe nominal sovereigns under effective foreign control, especially in cases where the establishment of the puppet State is intended as a cloak for illegality': Crawford, note 1 above, 78.

⁴⁰ Ibid 199.

⁴¹ Ibid 200-201.

⁴² See with regard to the International Red Cross, for example, Draper GIAD, 'The People's Republic of China and the Red Cross' in JA Cohen (ed.), *China's Practice of International Law: Some Case Studies* (Cambridge, MA: Harvard University Press, 1972) 344-398.

⁴³ Weng BSJ, 'Some Conditions of Peking's Participation in International Organizations' in JA Cohen (ed.), *China's Practice of International Law: Some Case Studies* (Cambridge, MA: Harvard University Press, 1972) 321-343, 328-329; see also Edgar Snow, *China, Russia and the U.S.A.: Changing Relations in a Changing World* (New York: Marzani & Munsell, 1962) 760.

Westphalia, a series of treaties that brought an end to the Thirty Years War.⁴⁴ As ‘international law seeks . . . to mediate amongst different and often conflicting ethical traditions’,⁴⁵ it is now appropriate to turn to China’s interpretation of international law, and of ‘sovereignty’ in particular.

Although the People’s Republic was not seated at the United Nations until October 1971, the support of the Chinese Communist Party for the United Nations body is on record as early as April 1945, some six months prior to the founding of the Organisation, and more than four years before the proclamation of the People’s Republic.⁴⁶ This though is not to imply that the People’s Republic has uncritically approved the practice of the United Nations, and indeed prior to its admission to membership it viewed the United Nations ‘as a tool for American aggression or a market-place for Soviet-American political deals’.⁴⁷ This perhaps emphasises political differences between Western states and Communist China, but, following its admission to the United Nations, the People’s Republic has become more and more integrated into the international legal system, and ‘is now fully engaged in international affairs’, attaching importance ‘to the role of international institutions and the rule of law in international affairs’.⁴⁸ Indeed, ‘many generally accepted international rules and practices have been incorporated into Chinese laws’.⁴⁹

⁴⁴ In essence the concept of sovereignty is of vital importance to the state system devised at Westphalia in 1648 as a compromise solution to the religious wars in Europe. As a result, sovereign states enjoyed independence, equality and unanimity, and each state enjoys exclusive and unfettered authority within its territorial boundaries. Sovereignty grounds the modern state system and derives as such from seventeenth-century Europe: Farley LT, *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy* (Boulder: Westview Press, 1986) 7-8.

⁴⁵ Hurrell A, ‘International Law and the Making and Unmaking of Boundaries’ in A Buchanan and M Moore (eds), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 275-297, 277.

⁴⁶ Hungdah Chiu and Edwards RR, ‘Communist China’s Attitude Toward the United Nations: A Legal Analysis’ (1968) 62(1) *American Journal of International Law* 20-50, 21.

⁴⁷ Ibid 50.

⁴⁸ Hanqin Xue, ‘China’s Open Policy and International Law’ (2005) 4(1) *Chinese Journal of International Law* 133-139, 139; see also 136. As evidence of Chinese participation in public

It would be wrong to assume, however, that the views of the People's Republic in respect of the role of international law are the same as the views taken in Western countries.⁵⁰ For China, law is an instrument of the state – a device that must serve the state: this is a policy in harmony with former Soviet Communist policy. Following from this, the role of international law is 'to act as an instrument of a state's foreign policy',⁵¹ and international law per se is confined as a law among states. Thus no other actors, be they individuals or international organisations, may be subjects of international law and granted legal personality.

This then provides reasoning underpinning China's interpretation of the concept of sovereignty: an emphasis on territorial integrity and non-interference in a state's domestic affairs.⁵² The state is the focal point of the 1982 Constitution of the People's Republic, and the Preamble thereof emphasises territorial integrity: 'The Chinese people and the Chinese People's Liberation Army have thwarted aggression, sabotage and armed provocations by imperialists and hegemonists, safeguarded China's national independence and security and strengthened its national defence.'⁵³

Largely it can be said that the People's Republic of China's concept of sovereignty is congruent with the Western doctrine in essentials, but it is in respect of recognition

international law, see Qiang Chen, 'Chinese Practice in Public International Law: 2004(II)' (2005) 4(2) *Chinese Journal of International Law* 607-645.

⁴⁹ Hanqin Xue, note 48 above, 138. See also section 5.3 below.

⁵⁰ Hungdah Chiu, 'Communist China's Attitude Toward International Law' (1966) 60(2) *American Journal of International Law* 245-267, 246.

⁵¹ Ibid 248.

⁵² See Ginsburgs G and Pinkete C, 'The Genesis of the Territorial Issue in the Sino-Soviet Dialogue: Substantive Dispute or Ideological Pas de Deux?' in JA Cohen (ed.), *China's Practice of International Law: Some Case Studies* (Cambridge, MA: Harvard University Press, 1972) 167-238, 176. Note in addition China's representative, Wang Guangya, to the UN Security Council at its 5028th meeting, on 2 September 2004, S.PV.5028: 'Respect for sovereignty, independence, territorial integrity and the principle of non-interference in internal affairs in international relations constitutes the centrepiece of China's foreign policy' (also quoted in Qiang Chen, 'Chinese Practice in Public International Law: 2004(I)' (2005) 4(1) *Chinese Journal of International Law* 285-296, 296).

⁵³ Preamble, paragraph 2, Constitution of the People's Republic of China, adopted 4 December 1982, accessible, for instance, at <<http://english.peopledaily.com.cn/constitution/constitution.html>>.

that difference becomes evident. The break-up of states through secession following the exercise of self-determination is a particular anathema to China,⁵⁴ as such break-up is a direct affront to the principle of territorial integrity and the policy that international law must serve the state. This then evidences a divergence in interpretation between the People's Republic and the former Soviet Union concerning self-determination. The latter recognised the right to self-determination for its national minorities following from Lenin's theory of capitalist imperialism, and enshrining that right in the Soviet Constitution.⁵⁵ The disintegration of the Soviet Union has arguably been facilitated by this incorporation.⁵⁶ The People's Republic, however, did not pursue the rights of its own national minorities to self-determination, having rejected the principle on attaining power, and has declared itself to be a multinational unitary state, opting for a system of regional autonomy within that unitary state.⁵⁷

For China, therefore, sovereignty appears to be an inflexible doctrine inextricably linked with territorial integrity; while for Western states the doctrine has some

⁵⁴ This though was not always the case for Chinese Communists. See paragraph 14 of the 1931 Constitution of the [Chinese] Soviet Republic proclaimed by the First All-China Soviet Congress in November 1931: 'The Soviet government of China recognizes the right of self-determination of the national minorities in China, their right to complete separation from China, and to the formation of an independent state for each national minority. All Mongolians, Tibetans, Miao, Yao, Koreans, and others living on the territory of China shall enjoy the full right to self-determination, i.e. they may either join the Union of Chinese Soviets or secede from it and form their own state as they may prefer.' Brandt C, Schwartz B and Fairbank JK, *A Documentary History of Chinese Communism* (New York: Atheneum, 1971) 223. Once the Chinese Communist Party assumed power in 1949, however, it rejected the principle of national self-determination: Hannum H, note 1 above, 420. Secession from the state is indeed anathema to all states, and it is noteworthy that the Soviet Union consented to its own break-up, although Russian unhappiness at this may be gauged on an ongoing basis, for example in its relations with the Ukraine: see section 2.4.2.1 above. Russia has not been willing, nevertheless, to countenance the secession of Chechnya, regarded as a federal unit within Russia: see note 105, Chapter 2 above. Despite what may be termed a global outlook on unilateral secession, the EU has accepted unilateral secession from the former Yugoslavia, see note 17 above; and also note the situation regarding the future status of Kosovo: section 6.3.3 below.

⁵⁵ For instance, by Article 72 of the last Constitution of the Soviet Union, adopted on 7 October 1977, 'Each Union Republic shall retain the right freely to secede from the USSR.'

⁵⁶ The break-up of the Soviet Union and the reasoning behind it is a topic beyond the scope of this thesis. See, though, section 2.4.2.1 above for further comment on the subject.

⁵⁷ See Dawa Norbu, *China's Tibet Policy* (Richmond, Surrey: Curzon Press, 2001) 366-368; also the 1982 Constitution of the People's Republic, paragraph 3 of the Preamble: 'The People's Republic of China is a unitary multi-national state built up jointly by the people of all its nationalities.'

flexibility being constrained by the criteria, particularly perhaps that of effective government, laid down by Article 1 of the Montevideo Convention on Rights and Duties of States.⁵⁸ This flexibility may be seen in the reaction of Western Countries to the break-up of the former Yugoslavia, although this reaction may be interpreted as an exception to a failure to support secessionist entities rather than a support for the concept of secession. States have not, for example, doubted that Chechnya is a part of Russia and as such is not entitled to secede; hence any criticism of Russian policy and activities in Chechnya is muted.⁵⁹

4.3 Changing Concepts of Sovereignty

It would be wrong to view sovereignty as a static concept. Just as self-determination evolves, so does sovereignty.⁶⁰ As a starting point, though, '[t]he absolute power of the sovereign state has been the foundational doctrine for political theory and practice',⁶¹ a view shared by Thomas Hobbes⁶² and Jean Bodin,⁶³ and one which the People's Republic of China would not dispute.

⁵⁸ See sections 4.2.1 and 4.2.1.3 above.

⁵⁹ Nevertheless there may be a new tendency towards a support for secessionist entities. See especially the situation re Kosovo, section 6.3.3 below.

⁶⁰ A norm of customary international law may evolve, and a violation of that norm, rather than creating a new norm, may form an exception to that norm, thus confirming the existence of the norm. See, for example, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Rep 1986, 14, confirming that a violation, or conduct inconsistent with a given rule of customary international law, should not be considered as creating a new norm but confirming the existence of an old norm: see para. 186 of the Judgment dated 27 June 1986. Similarly an extension of the principle of self-determination to Kosovo, if brought to fruition, see section 6.3.3 below, will not necessarily bring about a new norm permitting secession, but may take the form of an exception to norms of sovereignty and territorial integrity. Equally, in the case of the 2003 invasion of Iraq: this in probability constitutes an exception to and violation of the customary rule against the use of armed force rather than the creation of a new norm.

⁶¹ MacCormick, note 1 above, 124.

⁶² Ibid 123.

⁶³ See Bodin J, *On Sovereignty: Four chapters from The Six Books of the Commonwealth*, Edited and Translated by Julian H Franklin (Cambridge: Cambridge University Press, 1992), for example at 1: 'Sovereignty is the absolute and perpetual power of a Commonwealth' (footnote omitted).

Nevertheless certain factors have come about to check the powers of the sovereign state. One such has been the evolution of human rights covenants and conventions, which check and control external sovereignty – the authority granted to each state by international law to exert legal control over the territory within its boundaries without deferring to any claim in respect of legal superiority made by any organisation or third state.⁶⁴ The existence of such covenants and conventions exerts a cooling influence on the powers of a state to act without impediment within its borders. There may be criticism of its actions, and indeed direct interference within its territory by, for instance, human rights organisations – attached to the United Nations or otherwise. Otherwise sectoral challenges also affect the independent function of the state – exemplified by the World Trade Organization:⁶⁵ an example of globalisation in practice.⁶⁶

Thus, then, while for such as Lawrence Farley sovereignty is ‘the defining characteristic of the modern state system’,⁶⁷ this becomes ever less the case. This evolution is buttressed by such developments as the Internet, which has the potential to impinge on the sovereignty of the state.⁶⁸ The onward march of technology ensures

⁶⁴ MacCormick, note 1 above, 129, 134; also see Chapter 5 below. As William Twining puts it, ‘municipal law can no longer be treated in isolation, either internally or externally . . . the twin doctrines of national sovereignty and non-interference in the internal affairs of independent states are being steadily challenged, most prominently, but not exclusively, by international humanitarian and human rights law’: Twining W, *Globalisation and Legal Theory* (London: Butterworths, 2000) 51. There is an increasing influence of human rights law evident on international discourse. Humanitarian intervention has been criticised on the basis that it is ‘deeply corrosive’ of the rule of non-intervention in the internal affairs of states: Kaldor M, ‘American Power: From “Compellence” to Cosmopolitanism?’ in D Held and M Koenig-Archibugi (eds), *American Power in the Twenty-First Century* (Cambridge: Polity Press, 2004) 181-213, 204, referring to Bull H, ‘Conclusion’ in H Bull (ed.), *Intervention in World Politics* (Oxford: Clarendon Press, 1984) 181-195, 183.

⁶⁵ Tierney S, ‘Reframing Sovereignty: Sub-State National Societies and Contemporary Challenges to the Nation-State’ (2005) 54(1) *International and Comparative Law Quarterly* 161-183, 164.

⁶⁶ Globalisation poses challenges to the independent function of the state, and presents challenges to traditional legal theory, for instance challenging “‘black box theories” that treat nation states, societies, legal systems, and legal orders as closed, impervious entities that can be studied in isolation’: Twining, note 64 above, 252.

⁶⁷ Farley, note 44 above, 8.

⁶⁸ As instanced by calls on websites for attack on the integrity of the state, for example by Islamists in the UK such as the British *jihad* group Al Ghurabaa.

a dissemination of information into states, which governments cannot entirely control, thus undermining the ability of governments to control their own population and, in turn, sovereignty.⁶⁹ This is evidently of significance in the case of 'closed' societies: a new source of information filters into society and its members, giving new insights to the population potentially at the expense of state authority. This serves to emphasise the importance of political realism: while the state possesses considerable power it 'is a construct of social practices', therefore 'a possible object of political contestations' and open to developments in the wider world, both in respect of dissemination of the views of individuals and in the dissemination of other political and legal ideas.⁷⁰ In the context of China, it is worth noting that the country now has 111 million 'netizens', people with connection to the Internet; this represents 8.5 per cent of the country's total population.⁷¹ Even in this regard, though, the power of the state should not be ignored, as evidenced by the 'cave in' by Google, the Internet search engine, reported on 25 January 2006, 'to pressure from the Chinese Government by launching a local website that strips out information not approved by the Communist authorities'.⁷² Search terms blocked by Google on Google.cn as a result are said to include references to Taiwanese and Tibetan independence.⁷³ Developments of this

⁶⁹ See, in this context, Stern DS, 'State Sovereignty, the Politics of Identity and the Place of the Political' in ME Denham and MO Lombardi (eds), *Perspectives on Third-World Sovereignty: The Postmodern Paradox* (Basingstoke: Macmillan Press Ltd, 1996) 28-38, 28.

⁷⁰ Ibid 37.

⁷¹ People's Daily Online, 'When 111 million people gather online' (2006) <http://english.peopledaily.com.cn/200601/19/eng20060119_236756.html>, accessed 19 January 2006.

⁷² Sabbagh D, 'No Tibet or Tiananmen on Google's new Chinese site' (2006) <<http://business.timesonline.co.uk/tol/business/markets/china/article719192.ece>>, accessed 25 January 2006.

⁷³ It is of note that in 2005 Google referred to Taiwan as a province of China, leading to protests from Taiwan: BBC News, 'Taiwan protests over Google map' (2005) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/4308678.stm>>, accessed 27 March 2007. Google Earth still refers to Taiwan as part of the PRC and to the Taiwan Provincial Government. The People's Republic realises the potential importance of the Internet and at the start of 2006 a website for the Central People's Government of the PRC was launched (www.gov.cn): see People's Daily Online, 'China effectively promotes administrative transparency' (2007) <http://english.people.com.cn/200703/23/print20070323_360429.html>, accessed 27 March 2007.

nature will provide a battleground for the concept of sovereignty in the early years of this century.⁷⁴

A third development impinging upon sovereignty is a combination of sub-state nationalism and supranationalism. This is particularly evident in Western liberal democracies, and is best evidenced by the continued advance of the European Union (EU) – representing an ‘ever closer union’ of the states of Europe.⁷⁵ Through the supranational body of the EU, states pool elements of their sovereignty, but at the same time in Europe a move towards subsidiarity pulls at the strings of sovereignty from the opposite direction. The federal principle of subsidiarity may be shortly defined as ‘the principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself’.⁷⁶ Thus smaller units seek greater power as against the state, at the

⁷⁴ Matters are by no means clear-cut. For example, a search for ‘tibetan independence’ on Google.cn on 26 January 2006 elicited the initial entry, among 282,000, of ‘Tibet Online’, which ‘Provides information about the plight of Tibet and serves as a virtual community space for the movement to end the suffering of the Tibetan people by returning the right of self-determination to the Tibetan people’ (<[http://www.google.cn/search?hl=zh-CN&inlang=zh-CN&ie=GB2312&q=tibetan+ind...>](http://www.google.cn/search?hl=zh-CN&inlang=zh-CN&ie=GB2312&q=tibetan+ind...)). Although the author cannot say with certainty that a search from China on Google.cn would have the same result, Chinese people would seem to have such access on Google.cn.

⁷⁵ As in the evocative title of Dinan D, *Ever Closer Union: An Introduction to European Integration*, Second Edition, Revised (Basingstoke: Palgrave, 1994).

⁷⁶ Carozza G, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97(1) *American Journal of International Law* 38-79, 38, note 1. Indeed, for Carozza, subsidiarity is seen as a structural principle of international human rights law, capable of mediating tensions between sovereignty and human rights, between the nation state and internationalism, and between various visions of human dignity and the diversity and freedom of cultures (ibid 38, 68). He argues that, ‘despite its potential to encourage pluralism in human rights, subsidiarity does not undermine the universal and fundamental nature of human rights in theory, nor the political effectiveness of human rights norms. It respects the inherent problems of unifying law and the legal diversity in legal norms while mitigating the risk that a global rule of law will impose uniformity at the expense of the diversity of human cultures . . . Subsidiarity offers a contrast to prevailing patterns of understanding on the place of human rights in the international order, which are based largely on more limited conceptions of sovereignty’ (ibid 78). Thus in this respect, in the sphere of public international law, subsidiarity itself becomes an alternative principle to sovereignty, rather than a part of its developing concept. Note also in this context MacCormick, note 1 above. It is though of relevance that developments at EU level are based on consent of member states, either unanimously or through use of qualified majority voting, and it is in the EU that the main debate on subsidiarity lies; there is in the EU a ‘conscious confusion written into the definition of subsidiarity’, a term that is in its meaning open to a number of possible interpretations: Ward I, *A Critical Introduction to European Law* (London: LexisNexis, 2003) 47. It has been seen as ‘a device for reinvesting primary competences in the nation states’ (ibid 58), but at its most basic it is a federal concept (Dinan, note 75 above, 152) providing that ‘decisions should be taken

same time as the supranational body of the EU seeks greater powers for itself. The sovereignty of the state is caught in between. Although international law is a powerful force in defence of the power of the state, being concerned with the order of states, subsidiarity enhances human rights obligations in opposition to sovereignty, affirming diversity more than universal state values.⁷⁷

Consequently it is evident that challenges are being mounted to the supremacy of the concept of sovereignty, to the nation state as the pre-eminent site of territorial integrity.⁷⁸ In turn one may perceive the declining power of the nation state, yet this may be over-emphasised.⁷⁹ Sovereignty as a construct is still of fundamental relevance. Indeed modern realists view sovereignty as a given, a fact of life,⁸⁰ and sovereignty is not something that disappears easily. The state maintains a normalising power and each state may be viewed as ‘a continuous homogeneous project’.⁸¹ Even in the EU, nation states maintain powers and continue to seek advantage.⁸²

The fact that sovereignty evolves as a concept will not by any means necessarily diminish its importance, although in its development interstices may open up,

at a level as low as possible’: van Kersbergen K and Verbeek B, ‘The Politics of International Norms: Subsidiarity and the Imperfect Competitive Regime of the European Union’ (2007) 13(2) *European Journal of International Relations* 217-238, 218.

⁷⁷ See Carozza, *ibid*, especially 68-69; Tierney, note 65 above, especially 171.

⁷⁸ See Tierney, note 65 above, 164.

⁷⁹ Lombardi MO, ‘Third-World Problem-Solving and the “Religion” of Sovereignty: Trends and Prospects’ in ME Denham and MO Lombardi (eds), *Perspectives on Third-World Sovereignty: The Postmodern Paradox* (Basingstoke: Macmillan Press Ltd, 1996) 152-163, 153. See also James, note 1 above, 275.

⁸⁰ Walker RBJ, ‘Space/Time/Sovereignty’ in ME Denham and MO Lombardi (eds), *Perspectives on Third-World Sovereignty: The Postmodern Paradox* (Basingstoke: Macmillan Press Ltd, 1996) 13-27, 23 and 25.

⁸¹ Shapiro MJ, ‘Moral Geographies and the Ethics of Post-Sovereignty’ in ME Denham and MO Lombardi (eds), *Perspectives on Third-World Sovereignty: The Postmodern Paradox* (Basingstoke: Macmillan Press Ltd, 1996) 39-59, 45.

⁸² As sovereignty has been seen to erode within the EU, the concept of sovereignty does not go down without a fight. For example: ‘As state sovereignty has eroded into a relative concept, a significant portion of the German juridical debate has responded by over-emphasising the sovereignty of the German state over and above its European and international commitments as part of its crusade against what is seen by many as the “withering away” of the state’ (footnotes omitted) – Aziz M, ‘Sovereignty *Über Alles*: (Re)Configuring the German Legal Order’ in N Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 279-304, 281.

allowing additional space for wider interpretation of such concepts as self-determination in an international law dominated by rights and obligations of states toward each other, in other words in a state of affairs under the dominant system of sovereignty. With that in mind the thesis proceeds to discuss sovereignty in the context of Tibet and its relationship with China.

4.4 Tibetan Sovereignty

4.4.1 *Introductory Words*

It is not the purpose of this thesis to perform an in-depth analysis of the status of Tibet at the time of the ‘liberation’ or ‘invasion’ by the Communist government in 1950.⁸³ As indicated in Chapter 3 above, there is polarised debate as to the precise Sino-Tibetan relationship: Tibetans arguing that Tibet was a fully independent state at this time,⁸⁴ and the People’s Republic arguing that Tibet was an integral part of the territory of China.⁸⁵

⁸³ The thesis is particularly concerned with the situation as it now pertains. This is not to say the historical status is of no significance, however, as if Tibet had been an independent state in 1950 then China would have been internationally responsible for its aggression and use of force against another state: Article 2(4) of the Charter of the United Nations. If the criteria for statehood of Tibet existed in 1950 then Tibetan sovereignty would have been infringed, even though Tibetan sovereignty was not recognised at the time. This though is a separate historical question and the point to bear in mind is that no state in the intervening period has recognised Tibetan sovereignty. See Chapter 3, note 76 above.

⁸⁴ See section 3.3.4 above.

⁸⁵ See, for example, Ministry of Foreign Affairs of the People’s Republic of China, ‘Foreign Spokesperson Zhang Qiyue’s Response to the Second Presidential Report on the “Tibet Issue” Submitted by the US Government to the Congress’ (2004)

<<http://www.fmprc.gov.cn/eng/xwfw/2510/2535/t142928.htm>>, accessed 29 March 2006: ‘Tibet is a part of China and the Tibetan affairs completely fall within China’s internal affairs.’ This is compounded by the Chinese emphasis that ‘Civil conflicts are, in the final analysis, the internal affairs of sovereign countries’: Ministry of Foreign Affairs of the People’s Republic of China, ‘Stepping up International and Regional Cooperation to Put an End to Armed Conflicts and Remove their Sources’ (2004)

<<http://www.fmprc.gov.cn/eng/wjdt/zyjh/t142395.htm>>, accessed 29 March 2006. See also Qiang Chen, note 48 above, 622.

Each side adduces evidence⁸⁶ and an impasse is reached as to Tibet's status.⁸⁷ Nevertheless, prior to 1950 it would appear that sovereignty was at best exercised over Tibet by China in an ad hoc fashion and with a light touch such as to appear to have been imperceptible.⁸⁸ Thus it is difficult to maintain a position that China exercised absolute political authority over Tibet and therefore sovereignty.⁸⁹ In the end, sovereignty is a concept applicable to power,⁹⁰ and certainly during the first half of the twentieth century China did not exercise power over Tibet.

There is evidence that the Tibetan government exercised power during this period,⁹¹ but in its secrecy and its failure to modernise, and particularly in its failure to establish foreign relations with all but a few countries, lie the failure of other countries to recognise it as a state.⁹² It maintained a policy of isolationism, and as Tibet was not

⁸⁶ See, for example, the sources cited at note 13 of Chapter 3; also, for instance, Alexandrowicz-Alexander CH, 'The Legal Position of Tibet' (1954) 48(2) *American Journal of International Law* 265-274 and Tieh-Tseng Li, 'The Legal Position of Tibet' (1956) 50(2) *American Journal of International Law* 394-404.

⁸⁷ In this context it may be history is of limited use in asserting a given proposition regarding the sovereignty of Tibet, and it is worth noting the words, inter alia, of Nikita Khrushchev in a letter to the governments of all countries dated 31 December 1963 in connection with a Sino-Soviet territorial issue: 'In many cases, references to history are of no assistance. Who can affirm, say, that a reference to the 17th century which one state puts forward in substantiation of its territorial claim, is more valid than, for instance, a reference to the 18th or 19th century by which the other state tries to bolster its own counter-claim?' Quoted in Ginsburgs and Pinkele, note 52 above, 215.

⁸⁸ As Tsering Shakya noted in the context of a small Chinese mission installed at Lhasa in 1939, 'The Tibetans never accepted that the presence of the Chinese mission meant that they had acknowledged Chinese sovereignty': Tsering Shakya, *The Dragon in the Land of the Snows: A History of Modern Tibet Since 1947* (London: Pimlico, 1999) 7.

⁸⁹ In this context see Groarke P, *Dividing the State: Legitimacy, Secession and the Doctrine of Oppression* (Aldershot: Ashgate Publishing Limited, 2004) 49.

⁹⁰ Curry S, *Indigenous Sovereignty and the Democratic Project* (Aldershot: Ashgate Publishing Limited, 2004) 47.

⁹¹ See, for example, Tsering Shakya, note 88 above, 4.

⁹² 'Tibet fell because it failed to cope with changes in the modern world – more specifically Tibetan elites' failure to modernize their state structure, traditional economy and social system': Dawa Norbu, note 57 above, 174. See also Jane Ardley regarding the role of the monasteries in 'thwarting the progress of Tibet': Ardley J, *The Tibetan Independence Movement: Political, religious and Gandhian perspectives* (London and New York: RoutledgeCurzon, 2002) 18; and Melvyn Goldstein's comment that 'Tibet's religious segment was ultimately responsible for its military backwardness': Goldstein MC, *A History of Modern Tibet, 1913-1951: The Demise of the Lamaist State* (Berkeley and Los Angeles, CA: University of California Press, 1989) 815.

perceived to be of pivotal importance to major powers they had no incentive to recognise and support Tibet against the power of China.⁹³

Consequently the legal status of Tibet at the time of the entry of the People's Liberation Army (PLA) into Tibet in 1950 is uncertain and clouded in controversy. It is therefore appropriate to turn to analyse the issue of sovereignty of Tibet at the start of the twenty-first century, a time, some fifty years on, when Tibet finds itself ever more integrated into the People's Republic of China.

4.4.2 Tibet at the Beginning of the Twenty-First Century

Ethnographic Tibet today spreads over a number of provinces of China. The Tibet Autonomous Region (TAR) includes the Tibetan province of Ü-Tsang and its western extensions, while the Tibetan provinces of Amdo and Kham are largely incorporated within Qinghai, Gansu, Sichuan and Yunnan. The ethnic boundaries of Tibet have not been congruous at all times with its political boundaries. The latter have been delineated on China's maps and these historically define an area representing the TAR. Tibetans spill over those boundaries, however, not only into the other Chinese provinces mentioned but also into Nepal, Sikkim, Bhutan and Ladakh.⁹⁴ Even though at the start of the twenty-first century Tibet does not benefit from statehood, bearing

⁹³ This is in contrast to the instance of Outer Mongolia, which gained independence from China with the aid of Russian support. Russia, in the early years of the 20th century, carved out a 'sphere of interest' in Outer Mongolia, recognised explicitly by Britain, France and Japan, and implicitly by other major powers. The burgeoning power of the Soviet Union supported Outer Mongolia against China, and ultimately China, under the Kuomintang government, recognised the independence of Outer Mongolia on 5 January 1946. It is at least arguable that at the start of the 20th century the positions of Outer Mongolia and Tibet vis-à-vis China were similar. See, generally, re Outer Mongolia: Friters GM, *Outer Mongolia And Its International Position* (London: George Allen & Unwin Ltd, 1951) and Nemzer L, 'The Status of Outer Mongolia in International Law' (1939) 33(3) *American Journal of International Law* 452-464. It should be noted that Tibet's policy of isolationism was deliberately pursued, and in this context Tibet had decided against joining the League of Nations in the 1920s: Tsering Shakya, note 88 above, 53.

⁹⁴ See Grunfeld AT, *The Making of Modern Tibet*, Revised Edition (Armonk, New York, and London: ME Sharpe, 1996) 249.

in mind the disputed nature of its past it is pertinent to consider at this stage of the thesis the different elements of sovereignty as they may be applied to present-day Tibet. This will enable an analysis of the situation in the context of the changing concepts of sovereignty.⁹⁵

4.4.2.1 A Tibetan Population?

While the precise population of Tibet half a century ago is a matter of estimate and debate, what is not so much in dispute is the make-up of that population in the TAR. In the summer of 1952, the Tibetan population is said by Mao to have been between 2 and 3 million,⁹⁶ which largely tallies with a Chinese estimate of ‘just under three million in the early 1950s’ referred to by Tom Grunfeld,⁹⁷ whereas Hugh Richardson refers to an official Chinese estimate in 1951 of 3.75 million and a later Chinese Communist figure of 1,274,969 Tibetans.⁹⁸ It will be recalled that in 1913 no Chinese remained in Tibet,⁹⁹ and in the early 1950s little had changed in this regard. Mao is quoted as stating in 1952 that, ‘while several thousand Han people live in Sinkiang, there are hardly any in Tibet, where our army finds itself in a totally different minority nationality area’.¹⁰⁰ Even in 1960 Han civilians in the TAR have been said to number only 50,000.¹⁰¹

These figures are in the nature of estimates, but a 1990 census ‘found a Tibetan population of 4.59 million, about one-half (2.2 million) of whom live within the

⁹⁵ See the discussion at section 4.3 above generally re the changing concepts of sovereignty.

⁹⁶ See Tsering Shakya, note 88 above, 114.

⁹⁷ Grunfeld, note 94 above, 250.

⁹⁸ Richardson HE, *Tibet and Its History*, Second Edition, Revised and Updated (Boulder and London: Shambhala, 1984) 6.

⁹⁹ See section 3.2.1 above.

¹⁰⁰ International Committee of Lawyers for Tibet and Unrepresented Nations and Peoples Organization (ICLT and UNPO), *The Case Concerning Tibet: Tibet's Sovereignty and the Tibetan People's Right to Self-Determination* (New Delhi: Tibetan Parliamentary & Policy Research Centre, 2000) 5.

¹⁰¹ See Grunfeld, note 94 above, 252.

boundaries of the [TAR]'.¹⁰² The Unrepresented Nations and Peoples Organization (UNPO) currently estimate a Tibetan population of about 6 million within the area of ethnographic Tibet, of whom approximately 2.44 million live within the TAR. At the same time, though, the UNPO estimate that there are 7.5 million Chinese settlers now within ethnographic Tibet, of which number about 160,000 are within the TAR.¹⁰³ Tibetans are now said to represent one of fifty-six ethnic groups within the People's Republic; and through the organ of the People's Daily China continues to estimate the population of Tibetans at 4.59 million.¹⁰⁴

Article 1 of the Montevideo Convention on Rights and Duties of States provides that a state should possess a permanent population. Tibet, certainly the TAR, potentially meets this criterion as an entity, in that Tibetans represent a distinct population. They are recognised by the People's Republic as a minority nationality,¹⁰⁵ and even today represent a significant majority of the population of the TAR. Indeed, in any event, statehood does not depend upon nationality; it is nationality that depends upon statehood. Therefore while Tibetans are Chinese in circumstances where Tibet is a part of China, if Tibet achieves statehood its population would be recognised as Tibetans.

It can thus be concluded that notionally Tibetans represent a permanent population sufficient to meet this particular criterion of Article 1 of the Montevideo Convention, and the Dalai Lama is quoted as saying 'Tibet was and is in fact different from China

¹⁰² Ibid 253.

¹⁰³ Unrepresented Nations and Peoples Organization, 'Tibet' (2007) <http://www.unpo.org/member_profile.php?id=73>, accessed 14 September 2007. Though note Avedon JF, *In Exile from the Land of Snows: The Dalai Lama and Tibet Since the Chinese Conquest* (New York: HarperPerennial, 1994, reissued 1997) 376; Hannum, note 1 above, 426.

¹⁰⁴ See People's Daily Online, 'The Tibetan ethnic minority' (2006) <<http://english.peopledaily.com.cn/data/minorities/Tibetan.html>>, accessed 24 January 2006 and People's Daily Online, 'Ethnic Groups' (2006) <<http://english.peopledaily.com.cn/china/19990914A104.html>>, accessed 24 January 2006.

¹⁰⁵ ICLT and UNPO, note 100 above, 5.

– racially, culturally, linguistically, geographically and historically. No knowledgeable person would for a moment think that Tibetans are Chinese.’¹⁰⁶ Yet, more problematic, is the question of ‘a defined territory’, with distinctions being drawn between the TAR and other Tibetan provinces.

4.4.2.2 Tibetan Territory

At this juncture Tibet, incorporated within China, has no state territory, although China concedes a Tibetan territory to the extent of the TAR. Remaining territory that Tibet would lay claim to comprises the former Tibetan provinces of Kham and Amdo.¹⁰⁷ As states must ultimately have boundaries, is it feasible to delineate an area for a Tibetan state? Bearing in mind the de facto state of affairs pertaining it is necessary to look at this from the Chinese point of view.

A starting point realistically is Article 52 of the 1982 Constitution: ‘**It is the duty of citizens of the People’s Republic of China to safeguard the unity of the country and the unity of all its nationalities.**’¹⁰⁸ This Article emphasises not only territorial integrity, but also the unity of all fifty-six Chinese nationalities within that territory. There are in particular three additional factors that stress China’s state commitment to the entire area of ethnographic Tibet.

The first of these factors attaches to external security, itself directly linked to territorial integrity and the unity of the country. Although Tibet is now integrated in China, in the first half of the twentieth century an essentially independent Tibet acted as a buffer zone between the Chinese state and the British Empire in India. While Britain showed interest in Tibet at this time, its withdrawal from India in 1947

¹⁰⁶ See Dawa Norbu, note 57 above, 313.

¹⁰⁷ See section 4.4.2 above.

¹⁰⁸ Emboldened text in original.

brought an end to its direct interest in the region, and thus a buffer zone of Tibet would then separate China and India. By incorporating Tibet, China has removed this buffer zone, with the result of a direct Sino-Indian border. The border is at points disputed, and one result of the incorporation of Tibet from China's viewpoint is to transfer Tibet's previous functions as a buffer state to Nepal and Bhutan. In addition China supports rights of national self-determination in neighbouring areas of Kashmir, Nagaland and Sikkim. China thus seeks to encourage anti-Indian nationalism in Himalayan states with the idea of increasing its own security, and Tibet becomes intrinsically of value in the context of Sino-Indian relations, no longer as a buffer state but as an integral part of the Chinese state. If India were to have access to an independent Tibet, this would provide a 'back-door' opening for India into the Chinese mainland. Tibet thus assumes a geopolitical importance, of crucial strategic value to the People's Republic.¹⁰⁹ In this sense, therefore, from a security aspect Tibet is of specific value to the Chinese Government.

The other two factors also have security connotations. The first relates to nuclear installations. Chinese strategists have chosen Amdo and Kham for their nuclear sites, and it is believed missiles are based at sites in the Qaidam Basin, now within Qinghai province.¹¹⁰ In addition to missile deployment and launch sites, the Tibetan plateau has been used for nuclear experimentation and testing. Control over ethnographic Tibet thus gives a strategic initiative to China, and generally reinforces its security and territorial integrity.¹¹¹

¹⁰⁹ See Dawa Norbu, note 57 above, 246-247 and 228-229.

¹¹⁰ See Norris RS and Arkin WM, 'Chinese nuclear forces, 1999' (1999) 55(3) *Bulletin of the Atomic Scientists* 79-80; also Wilderness Society (The), 'Tibet 2000: Environment And Development Issues, part 2' (2000)

<<http://www.wilderness.org.au/campaigns/international/tibet/tibet2000b/>>, accessed 4 April 2006.

¹¹¹ Dawa Norbu, note 57 above, 245.

The last of the factors relates to communications. Since 1950 China has funded the building of roadways in Tibet. These arterial routes not only open up the TAR, for example to enable the extraction and transport of mineral deposits, but also enable a free movement of military personnel and supplies to strategic border areas. Similarly, construction of a major rail link between Golmud in Qinghai and Lhasa commenced in July 2001. The 710-mile line was completed in October 2005, and links Lhasa to Xining, capital of Qinghai, and on to other major cities in China.¹¹² This too will ease the transportation of, for instance, raw materials from Tibet, and of course goods into Tibet, but will also potentially aid the transport of military equipment and personnel. Lastly in this context, the construction of a network of air bases in the TAR has the potential for military use.¹¹³

These factors all dovetail in with the People's Republic of China's emphasis on territorial integrity, security, and non-intervention by others in its internal affairs. The totality renders it unlikely that China would be prepared to cede any territory to an independent Tibet. Yet other factors may come into play, and it may prove necessary to distinguish between the TAR and other regions of ethnographic Tibet. In that context it should be noted that the Seventeen-Point Agreement of 1951 related only to the TAR, and not to Kham and Amdo, which China considered not to fall within the jurisdiction of the government of the Dalai Lama at Lhasa.¹¹⁴ This in itself raises an interesting point: if China considered in 1951 that Kham and Amdo did not fall within the jurisdiction of the Dalai Lama's government, by implication there seems a tacit

¹¹² See BBC News, 'China completes railway to Tibet' (2005) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/4345494.stm>>, accessed 30 January 2006, and China Daily, 'Qinghai-Tibet railway project steams ahead' (2006) <http://www.chinadaily.com.cn/english/doc/2005-03/08/content_422679.htm>, accessed 30 January 2006.

¹¹³ See, generally, Dawa Norbu, note 57 above, 228-242.

¹¹⁴ Ibid 189, 219.

acceptance that the area of what is now the TAR did fall within that jurisdiction, which tacit acceptance may be seen as an acknowledgement of de facto Tibetan independence at that time over that territorial area.

It is also noteworthy that China's nuclear security is based in Qinghai, not in the TAR. It may be, therefore, that a Tibetan territory comprising the TAR rather than ethnographic Tibet may prove an option to be considered.¹¹⁵ Geopolitical factors may also prove to have relevance in this respect, as may factors relating to the changing concepts of sovereignty, which will be considered below,¹¹⁶ but to conclude this section, while a state needs to comprise a political community which is reasonably stable and be able to control a certain area, the existence of fully defined frontiers is not a necessity and a state is able to exist without territory.¹¹⁷

4.4.2.3 Effective Tibetan Government

The third element of sovereignty to be considered in respect of Tibet is that of effective government, or specifically the competence of Tibetans to effectively govern a certain territory. Historically, at the time of the PLA entry into Tibet in 1950, Tibetans governed Tibet through the person of the Dalai Lama or, during his minority, the regent, with the assistance of the Cabinet and National Assembly. It was indeed from what was a feudal system of governance that the People's Republic sought to liberate the Tibetan people. Whether or not the system extant in Tibet in 1950 was appropriate to the population is clearly a matter of debate.¹¹⁸ Nevertheless, the Tibetan government maintained an extensive administrative service and a judicial system, in

¹¹⁵ See below, sections 4.5 and 6.5.

¹¹⁶ See section 4.5.2.

¹¹⁷ See section 4.2.1.2 above.

¹¹⁸ This thesis, though, is not the place for that debate.

addition to a small army, a telegraph service and a system of taxation. Tibet also had its own currency and controlled its borders.¹¹⁹

Prior to 1951 there appears to have been effective government control by Tibetans over Tibet, certainly to the extent of the present TAR. The situation at that time with regard to Amdo and Kham is less clear. These areas enjoyed significant independence and freedom of action both from Lhasa and Beijing. They were remote from the centres of power, but in any event were not regarded by China as falling under the government of Lhasa.¹²⁰ That though is not to say that Amdowas and Khampas regarded themselves as Chinese rather than Tibetans. This is not the case. They identify with Lhasa as ‘the epicentre of their culture and loyalty’ and have increasingly done so during the last half-century.¹²¹

Since the exile of the Dalai Lama in 1959, a Tibetan government in exile has been created and is based in India at Dharamsala. Tibetans see this government as a natural continuation of the earlier government in Lhasa. In 1963 the Dalai Lama promulgated the implementation of a draft democratic constitution for the future Tibet, and this has now been superseded by the 1991 Charter of the Tibetans in-Exile (hereafter, the 1991 Charter), wherein a democratic system is offered to Tibetans ‘in order that the Tibetan People in-Exile be able to preserve their ancient traditions of spiritual and temporal life, unique to the Tibetans, based on the principles of peace and non-violence, aimed at providing political, social and economic rights as well as the attainment of justice

¹¹⁹ See ICLT and UNPO, note 100 above, 8-9 and Richardson, note 98 above, 16-25; regarding the question of boundaries and border control, see Chapter 3, note 117 and the texts referred to therein. The fact that, for example, Tibet had its own judicial system is important in that this is an attribute of states and evidence of lack of ‘foreign control’ over its territory and people. Compare the current situation: section 4.5.1 below. Also see, as to the characteristics of states, Warbrick C, ‘States and Recognition in International Law’ in MD Evans, *International Law*, Second Edition (Oxford: Oxford University Press, 2006) 217-275, 242-243.

¹²⁰ Dawa Norbu, note 57 above, 189, 215-216.

¹²¹ Ibid 353.

and equality for all Tibetan people'.¹²² This 1991 Charter thus echoes the 1966 International Covenants.¹²³ It provides for a clear separation of powers between judiciary, legislature and executive,¹²⁴ and guarantees everyone equality before the law and equal enjoyment of rights and freedoms without discrimination on the grounds of sex, religion, race, language and social origin.¹²⁵ Consequently it finds its base in the spirit of the Universal Declaration of Human Rights of 1948.

An Assembly of Tibetan People's Deputies was established in 1960 with elections in September of that year and subsequently.¹²⁶ With such an institution in place and a constitutional charter implemented, a democratic framework for Tibetan government exists, though, of course, it is not an essential element of statehood that a government be democratic. The aim of the 1991 Charter is 'to transform a future Tibet into a Federal Democratic Self-Governing Republic and a zone of peace throughout her three regions';¹²⁷ thus a future Tibetan state is intended by the Tibetan government in exile to include the entirety of ethnographic Tibet, not only the TAR. Politically this is important as Khampas and Amdowas have been strongly committed to the independence struggle, including commitment to a violent struggle.¹²⁸

¹²² Preface to the 1991 Charter. The Charter is available at <<http://www.tibet.com/Govt?charter.html>>. See also Ardley, note 92 above, 42-43. While the Charter is offered to all Tibetans, clearly such authority as it enjoys cannot be exercised within the People's Republic.

¹²³ International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

¹²⁴ 1991 Charter, Articles 19-70.

¹²⁵ Article 9.

¹²⁶ Ardley, note 92 above, 42.

¹²⁷ Preface to the 1991 Charter.

¹²⁸ See, for example, Ardley, note 92 above, 45 and Dawa Norbu, note 57 above, 216. In asserting any claim for independence, though, there is a potential problem to be borne in mind, and that is the Dalai Lama's emphasis in the Strasbourg Declaration that his negotiating position entails no demand for independence for Tibet: see Chapter 3, note 134.

The Tibetan government in exile has through its 1991 Charter provided for the administration of Tibetan settlements,¹²⁹ including provision that there should be ‘a Tibetan Administrative Office in every Tibetan settlement in-exile’.¹³⁰ Each Tibetan settlement is to have an administrator by Article 72, and Article 73 provides for elections of administrators, with appointment in default (Article 74). Article 77 specifies the duties of administrators, and provision is also made in Chapter VII for local assemblies in each Tibetan settlement.¹³¹

Centralised administrative and legislative bodies therefore exist so far as the Tibetans in exile are concerned and local assemblies in each established Tibetan settlement pass local laws for the community in exile.¹³² The Tibetan administration incorporates a Department of Information and International Relations, which aims, inter alia, to establish contacts with governments, international non-governmental organisations, and the United Nations to promote the Tibetan cause, and representative offices are maintained in ten countries, including the USA, the UK, India, Switzerland and Russia.¹³³ Even though Tibet has neither non-governmental nor observer status at the United Nations,¹³⁴ a Tibetan government, a modernised Tibetan government, is in place, potentially able to exercise governing power. Arguably Tibetans are more organised for effective government than Poland in 1919, or Burundi and Rwanda in 1962.¹³⁵ Among ethnic Tibetans the entitlement of the Tibetan authorities to exercise

¹²⁹ In Chapter VII.

¹³⁰ Article 71.

¹³¹ Articles 78ff.

¹³² See Central Tibetan Administration (The), ‘Legislature: The Tibetan Parliament-in-Exile’ (2007) <<http://www.tibet.net/en/atpd/>>, accessed 27 March 2007.

¹³³ Central Tibetan Administration (The), ‘International Relations Division’ (2007) <<http://www.tibet.net/en/diir/intrd.html>>, accessed 27 March 2007.

¹³⁴ See International Campaign for Tibet, ‘Former Tibetan Minister passes Away’ (2007) <<http://www.savetibet.org/news/newsitem.php?id=1074>>, accessed 27 March 2007.

¹³⁵ See section 4.2.1.3 above. It may also be noted that Guinea-Bissau was treated as a sovereign state before that Portuguese colony was granted formal independence, and while Portugal was in substantial

power is evidenced through the exercise of democracy, enabled by the democratic reforms put in place by the Dalai Lama and underwritten by the government in exile. This then demonstrates the potential to exercise effective authority in an independent state. There is actual exercise of authority over the exiled Tibetans.

All evidence above, historical and present, is indicative of the fact that Tibetans can satisfy the criterion of statehood of effective government. They can show actual exercise of authority historically, and at present over Tibetans in exile by virtue of the exercise of democracy; they can show the right to exercise that authority through the exercise of democracy; and ostensibly can show a stable political community. This is a precondition of any claim to statehood, but is not sufficient. Each state must show traits of independence, represented in the Montevideo wording as a ‘capacity to enter into relations with other States’.

4.4.2.4 Tibet’s Capacity to Enter into International Relations

Tibet has in the past entered into relations with other states, although instances of such relations are few. Hugh Richardson cites a number, including treaties with China in 821-822,¹³⁶ with Ladakh in 1842¹³⁷ and Nepal in 1856,¹³⁸ a convention with Britain in 1904,¹³⁹ the Simla Convention of 1914 involving Britain and China, the Declaration following which was signed by the plenipotentiaries of Britain and Tibet

control of its territory (James, note 1 above, 139). This emphasises the force of political factors in recognition of states.

¹³⁶ A treaty referring to frontiers between Tibet and China, and a peaceful alliance of the two dominions: reprinted in translation in van Walt van Praag MC, *The Status of Tibet: History, Rights, and Prospects in International Law* (London: Wisdom Publications, 1987) 287-288.

¹³⁷ Agreement referring to friendship following war and to trade: reprinted in van Walt van Praag, *ibid*, 290-291. See also Richardson, note 98 above, 261-262.

¹³⁸ Referring, *inter alia*, to aid, mutual assistance and trade: reprinted in van Walt van Praag, *ibid*, 292-295.

¹³⁹ An agreement in particular with regard to trade, but also incorporating in Clause IX(a) an engagement by the ‘Government of Thibet’ that ‘No portion of Thibetan territory shall be ceded, sold, leased, mortgaged or otherwise given for occupation, to any foreign Power’: reprinted in van Walt van Praag, *ibid*, 300-303.

only, due to the withdrawal of the Chinese,¹⁴⁰ and the Anglo-Tibetan Trade Regulations of 3 July 1914.¹⁴¹ In addition a treaty between Tibet and Mongolia is said to have been signed at Urga in December 1912, but the validity of this agreement has never been clearly established.¹⁴²

These instances demonstrate that prior to 1950 Tibet was capable of entering into international relations in the guise of a state, although did so on an infrequent basis. Similar evidence lies in the fact that Tibet remained neutral during World War II. It insisted on that neutrality to China, Britain and to the United States and, for example, the Tibetan government refused to allow the construction of a road through Tibet which would have enabled military supplies to be transported from British India to China; US aircraft were not permitted to fly over Tibetan airspace between India and China; and Tibet failed to extradite two escaped prisoners of war.¹⁴³ All these instances are indicative that Tibet had the capacity to act as a state and indeed did so diplomatically if sporadically.¹⁴⁴

¹⁴⁰ See section 3.2.1 above.

¹⁴¹ Reprinted in van Walt van Praag, note 136 above, 326-329.

¹⁴² The Urga Treaty is disputed to such an extent that there is a lack of consensus as to its definitive date: compare, for example, McCabe DA, 'Tibet's Declarations of Independence' (1966) 60(2) *American Journal of International Law* 369-371, 370 and Rubin AP, 'Tibet's Declarations of Independence' (1966) 60(4) *American Journal of International Law* 812-814, 812-813 (29 December 1912); Tieh-Tseng Li, note 86 above, 401 and Richardson, note 98 above, 280 (1913). Tieh-Tseng Li writes, *ibid*, with respect to the Urga agreement: 'No documentary evidence whatsoever can be found to show the existence of such a treaty which was only reported in the press traceable to British sources.' See generally, with regard to all these instances of relations mentioned, Richardson, *ibid*, 259-290.

¹⁴³ See ICLT and UNPO, note 100 above, 12-14. One of the prisoners of war was Heinrich Harrer: see Harrer H, *Seven Years in Tibet*, translation by Richard Graves (London: Rupert Hart-Davis and The Book Society, 1953). As to the refusal of the Tibetan government to allow the construction of the road, see van Walt van Praag, note 136 above, 70-73.

¹⁴⁴ Taiwan, however, is an entity that over the last half-century has entered into various agreements and conventions binding on its territory, has the attributes of statehood, and yet is not recognised as a state. James Crawford concludes that 'Taiwan is not a State because it still has not unequivocally asserted its separation from China and is not recognized as a State distinct from China': Crawford, note 1 above, 219, and see generally re Taiwan 198-221. The power of the People's Republic is evident with reference to the situation regarding Taiwan, as it is regarding Tibet. Though note that Tibet was not recognised as a state by the international community at the time of the Chinese insurgency in 1950, even though it asserted its independence.

It is though the paucity of international relations conducted by Tibet prior to 1950 that contributed to Tibet's problems thereafter, as perhaps did the Tibetan neutrality in World War II. In a sense that paucity is understandable: Tibet is a remote and vast area, with a relatively small population, at the time to an extent pastoral and nomadic. It is difficult to access, and this was particularly the case prior to the twentieth century. Such relations as it had prior to 1900 were largely with its immediate neighbours, and were principally on a religious basis. Few foreigners entered the country, and those who tried were often turned away.¹⁴⁵ Nevertheless, in 1950 the question arose as to whether there were any states that Tibet could rely on in its case against China. The answer then in essence was none – attributable in part to its isolation up to that date. The insurgence of the PLA into the Tibetan region in that year resulted in an appeal by Tibet to the United Nations for aid. The only country willing to put Tibet on the agenda was El Salvador, and on 24 November 1950 the UN voted to postpone the vote on the Tibet question. The vote was unanimous.¹⁴⁶ Tibet was friendless in the international arena and it was not until nine years later that any UN resolution was passed in respect of Tibet.¹⁴⁷

Since that time the persistence of the Dalai Lama in the international sphere has resulted in increased recognition of and sympathy for the Tibetan plight. His representatives travel the globe and he is now feted by governments and international organisations, not only as a religious leader but as the head of the Tibetan government in exile. For instance, he consorts with US Presidents¹⁴⁸ and has addressed the US

¹⁴⁵ As, for instance, Sven Hedin: see Hedin S, *Central Asia and Tibet: Towards the Holy City of Lhasa*, Vols I and II (Delhi: Low Price Publications, 1997); and *A Conquest of Tibet* (New York: E P Dutton & Co, Inc, 1934).

¹⁴⁶ Grunfeld, note 94 above, 97. See also note 50, Chapter 3 above.

¹⁴⁷ See section 3.4.3 above.

¹⁴⁸ For the Dalai Lama's latest meeting with US President George W Bush in November 2005, see China Daily, 'Beijing: Bush-Dalai Lama meeting negative' (2006)

Congress,¹⁴⁹ and in 1988 addressed the European Parliament, issuing before it his framework for Sino-Tibetan negotiations, known as the Strasbourg Proposal.¹⁵⁰ The raised profile of the Dalai Lama and his government in exile provide a platform for future international relations, although it is relevant to ask what may happen in this context on the death of the present Dalai Lama. Such is the association between him and Tibet that it may be that Tibet is perceived to be the Dalai Lama. Thus on his death the profile of Tibet on the world stage may reduce: a case of the actor embodying the cause.

Despite that potential difficulty two things can be demonstrated at this point. First, prior to 1950 Tibet had the capacity to enter into international relations and exercised that capacity, although on an infrequent basis. Secondly, in the intervening years the Dalai Lama and his government in exile have worked hard to cultivate relations in the international sphere.¹⁵¹ They have constructed a base for the future on which international relations could be conducted, although they cannot now speak for Tibet as a state in such relationships. The issue of independence becomes of direct

<http://www.chinadaily.com.cn/english/doc/2005-11/11/content_493744.htm>, accessed 1 February 2006.

¹⁴⁹ For example, on 21 September 1987: see Ardley, note 92 above, 23. In 2006, Congress passed 'A bill to award a congressional gold medal to Tenzin Gyatso, the Fourteenth Dalai Lama, in recognition of his many enduring and outstanding contributions to peace, non-violence, human rights, and religious understanding': GovTrack.us, 'S.2784 [109th]: Fourteenth Dalai Lama Congressional Gold Medal Act' (2006)

<<http://www.govtrack.us/congress/bill.xpd?bill=s109-2784>>, accessed 27 March 2007. President Bush signed the Bill on 27 September 2006. Congress recognised that the Dalai Lama is 'a leading figure of moral and religious authority' and 'spiritual and cultural leader of the Tibetan people' who 'has used his leadership to promote democracy, freedom, and peace for the Tibetan people through a negotiated settlement of the Tibet issue, based on autonomy within the People's Republic of China': GovTrack.us, 'S.2784 [109th]: Fourteenth Dalai Lama Congressional Gold Medal Act' (2006)

<<http://www.govtrack.us/congress/billtext.xpd?bill=s109-2784>>, accessed 27 March 2007. The Dalai Lama is not referred to as a head of state.

¹⁵⁰ Song Liming, 'Reflections on the Seventeen-point Agreement of 1951' in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 55-70, 65; also Yan Jiaqi, 'Federalism and the Future of Tibet' in Cao Changching and JD Seymour (eds), *ibid.*, 107-120, 109. See section 6.4.2 below for analysis of the Dalai Lama's Strasbourg Proposal.

¹⁵¹ For example, through the work of the Tibetan government in exile through its Department of Information and International Relations: see note 133 above and related text.

relevance. Currently there is control of Tibet by China, and the authority of the People's Republic holds sway.

While the independence of an existing state is said to have the protection of the rules of international law against unlawful invasion and annexation, this theory proved of no assistance to Tibet in 1950. Despite its claim for statehood then, the international community chose not to recognise it as such.¹⁵² Recognition then was key,¹⁵³ and it is so now. Tibet has the potential capacity to enter into relations with other states, but can the international community regard Tibet as independent?

4.4.3 *Recognition of Tibet*

In the years to 1950 few states had dealings with Tibet and accordingly few recognised Tibet as an independent state. The treaties mentioned in section 4.4.2.4 above evidence forms of recognition of Tibet as do the conduct of negotiations. Foreign missions were maintained in Lhasa by Britain, India, Nepal and Bhutan at various times, in addition to the *ambans* maintained in the city by China.¹⁵⁴ This limited recognition, however, provided no protection for Tibet.¹⁵⁵

¹⁵² It should be noted in this context that many states have operated at the international level – and been recognised as states – ‘which lack a full measure of sovereignty’: James, note 1 above, 176. Hence the evident importance of recognition.

¹⁵³ Even though recognition is not one of the four criteria of statehood: see note 17 above.

¹⁵⁴ See generally Government of Tibet in Exile (The), ‘The Status of Tibet’ (2006) <<http://www.tibet.com/Status/statuslaw.html>>, accessed 2 February 2006, which refers to these missions in Lhasa as ‘diplomatic missions’; see, though, section 3.2.1 above regarding, for example, the British view that Tibet was not an independent country *de jure*. See section 3.2 above re *ambans*. British interest in Tibet began as a trade interest, and later took the form of strategic and political interests as part of the ‘Great Game’; the other states bordered on Tibet, and thus interests were in the nature of trade, maintaining peace, and also of religion; China’s interest revolved around trade, religion and also protection: see, for example, Dawa Norbu, note 57 above, 358-359, van Walt van Praag, note 136 above, 17-25.

¹⁵⁵ At the same time, the declaratory theory of recognition does not equate recognition with whether a state actually exists or not, as the criteria for statehood do not include recognition. Thus a state could still make a claim for statehood, even if it has not been recognised as such, if its territory has been infringed.

Although a state may continue to exist after it has been illegally invaded and annexed,¹⁵⁶ this is of little assistance or comfort to that state if its statehood has not been recognised in the first place. The concept of recognition thus assumes importance, and it is the collective recognition of a state by an organisation such as the United Nations that is of the greatest practical relevance. This buttresses the declaratory theory of recognition. The few resolutions in the UN to date regarding Tibet coupled with the strength of the position of the People's Republic within the UN Security Council render any recognition of Tibet under a traditional definition of statehood unlikely.¹⁵⁷ States have shown they are not prepared to stand out against China, not only on issues of Tibet, but also on human rights issues.¹⁵⁸

It is the case, nevertheless, that the legal identity of a state may remain in the face of an effective annexation of that state. An example may be found in the resurrection of the Baltic States following the break-up of the Soviet Union.¹⁵⁹ The Tibetan situation is though rather different, particularly taking into account the differences in the constitutions of the former Soviet Union and the People's Republic.¹⁶⁰ Yet it is feasible to consider that the legal personality of Tibet could at a future date be regarded as having been preserved, 'so as to form the basis for the reconstruction of

¹⁵⁶ Crawford, note 1 above, 701: 'Belligerent occupation does not extinguish the State pending a final settlement of the conflict'; also, 688, 'It is well established that belligerent occupation does not affect the continuity of the State.' Similarly, Yannis A, 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics' (2002) 13(5) *European Journal of International Law* 1037-1052, 1038: 'Under modern international law, foreign invasion does not lead to the extinction of a state'.

¹⁵⁷ It must be accepted that the international community as a body did not recognise an independent Tibet in 1950.

¹⁵⁸ As exemplified by the lack of concerted sanctions against China, following the Tiananmen Square demonstrations and repression in 1989.

¹⁵⁹ See section 2.4.2.1 above.

¹⁶⁰ See section 4.2.3 above.

the State'.¹⁶¹ Again, though, the concept of recognition, with its heavily political overtones, comes to the fore.

The UN protects the territorial integrity of existing states,¹⁶² and the existing state of the People's Republic of China includes the territory of Tibet. Despite this, a Tibetan government in exile exists with the potential to supply effective government, and a Tibetan territory can be defined, as can a population. The recognition of governments is intensely political, and politics can change as indeed the concept of sovereignty changes.¹⁶³ It is now appropriate to summarise Tibet's current standing and to analyse how Tibet is placed in regard to the changing concepts of sovereignty, for if the international community recognised Tibet as a state it would seem a reasonable supposition that the community would recognise the Dalai Lama's government in exile.

4.5 Application of Sovereignty at the Present Time

4.5.1 Summation

It can be seen that there is a strong argument that Tibet satisfies the criteria for statehood. First, Tibet had a permanent, even if partly nomadic, population prior to 1950. Tibetans are a distinct ethnic group within the People's Republic, and have been recognised by the People's Republic as a minority nationality.¹⁶⁴ Tibetans can still be ethnically identified, comprising in part a body of people within ethnographic Tibet and in part a body in exile, and Tibetans represent a permanent population

¹⁶¹ Crawford, note 1 above, 703.

¹⁶² Article 2(4) of the UN Charter.

¹⁶³ Although the recognition of governments is essentially political, this should not be confused with recognition of states. 'That an entity is recognized as a State is evidence of its status': Crawford, note 1 above, 27.

¹⁶⁴ See section 4.4.2.1 above.

sufficient to meet the relevant criterion specified by Article 1 of the Montevideo Convention on Rights and Duties of States. The fact of a rising Han Chinese population in Tibet would not of itself preclude statehood for Tibet.¹⁶⁵ As to territory, prior to 1950 Tibet had boundaries – and indeed even today ‘Tibet’ on a world map would be identified by the international community. It certainly comprised the TAR; whether governance from Lhasa extended beyond into Amdo and Kham is less certain. A state must possess some territory, although can subsequently remain in existence without any territory.¹⁶⁶

The potential to exercise authority can prove adequate to establish the third criterion of effective government, as evidenced by the Congo in 1960,¹⁶⁷ and the Tibetan government in exile manifests the required potential, as well as maintaining a legally defined historical claim to the competence to govern Tibet. The potential is evidenced not only by the existence of the exile government, but by the effective control exercised by the Tibetan authorities prior to 1950 over their territory, at least to the extent of the present TAR.¹⁶⁸ Similarly the Tibetan government in exile has shown itself capable of entering into relations with other states, as did the Tibetan authorities pre-1950, albeit on an infrequent basis.¹⁶⁹

It is, however, the stance taken by the People’s Republic (and indeed its predecessors) that undermines any claims to sovereignty by Tibet. China argues, *inter alia*, that

¹⁶⁵ See Crawford, note 1 above, 52: statehood is not dependent upon nationality, but nationality upon statehood – see section 4.2.1.1 above.

¹⁶⁶ For example, Kuwait, after the invasion by Iraq in 1990, continued to exist as a state despite being a non-effective entity. The government of Kuwait in exile was still recognised even though it had no territory and could not control a particular area: Crawford, *ibid*, 97, 688.

¹⁶⁷ See section 4.2.1.3 above. ‘Anything less like effective government [than that which was in place in the Republic of the Congo after independence in 1960] would be hard to imagine. Yet despite this there can be little doubt that in 1960 the Congo was a State in the full sense of the term’: Crawford, *ibid*, 57. Similarly, Bosnia Herzegovina and Croatia did not exercise effective authority when they were recognised by EU states: see, for example, note 17 above, and Crawford, *ibid*, 93.

¹⁶⁸ See section 4.4.2.3 above.

¹⁶⁹ See section 4.4.2.4 above. It is worth noting that the fact that a state conducts relations with an entity does not mean that the state recognises the entity as a state also.

Tibet's government pre-1950 was a local government, not a national one,¹⁷⁰ and that its distinct language and culture are not prerequisites for independence.¹⁷¹ In addition, Tieh-Tseng Li argues that there has been reluctance, indeed incapacity, on the part of Tibet to enter into international relations.¹⁷² He also asserts that the position of Tibet in Chinese domestic politics is clear. In this context he quotes an explanation given to the General Committee of the United Nations by a delegate of the Chinese Nationalist Government in 1950: 'Tibet has been and still is a part of China; all Chinese whatever their party or religion regard it as such.'¹⁷³ This, to all intents and purposes, remains the position of China today under the government of the People's Republic.

The overall effect is that Tibet is unable, at the start of the twenty-first century, to demonstrate a lack of foreign control over its territory and people: it cannot show independence. The corollary is that Tibet is not recognised as a state, a situation that is unchanged from 1950, when such government and status as Tibet had was insufficient to protect it from the People's Liberation Army and annexation and incorporation into the People's Republic. Tibet is bound to accede not only to the authority of international law, but also to the absolute authority of the People's Republic.

¹⁷⁰ See section 3.3.3 above.

¹⁷¹ Grunfeld, note 94 above, 255.

¹⁷² See Tieh-Tseng Li, note 86 above, 402.

¹⁷³ Ibid 404. The unity of the motherland is of paramount importance. In a different context a spokesman of the Chinese Foreign Ministry stated, in 2004, that 'The Chinese people's will and determination to safeguard the integrity of the motherland is firm and unswerving': Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesman Kong Quan's Remarks on the Japanese Diet Panel's Resolution Concerning the Diaoyu Islands' (2004) <<http://www.fmprc.gov.cn/eng/xwfw/2510/2535/t82104.htm>>, accessed 29 March 2006.

4.5.2 Potential for Recognition of Tibet

Tibet has the potential to exert substantial independence, so it is of relevance to consider whether the changing concepts of sovereignty may assist.¹⁷⁴ It has been demonstrated that the creation of states does not depend on acts of recognition of all other states, but that the declaratory theory of recognition is pertinent, particularly through collective recognition of a state by an organisation such as the UN.¹⁷⁵ Equally though it is through non-recognition of new states that the status quo is maintained and existing states are able to maintain their territorial integrity. Issues of recognition are political, and in this sense international law is mediated through politics, although the legal elements themselves should not be forgotten.

Politics is of course subject to change, both in the international arena and internally. The Communist revolutions in China and also in the Soviet Union in the first half of the twentieth century perhaps exemplify both. As a corollary to the former revolution Tibet found itself enmeshed within the People's Republic. Having established its state through revolution, China lays stress on its territorial integrity and on non-interference by the international community in its domestic affairs, while at the same time pursuing its claim to unify 'the motherland', for example by incorporating Tibet, recovering Hong Kong, and seeking to reunify Taiwan with mainland China.

The Communist revolutions have not produced a static situation in the resultant states. This has been particularly the case in the Soviet Union, which in the last twenty years has broken up into its constituent parts. Differences in the Soviet and Chinese constitutions have facilitated this eventuality, yet its existence establishes that history

¹⁷⁴ The concept of sovereignty is not static: see section 4.3 above. The development of the law of self-determination, for example, has had 'a substantial impact on the content of the criteria of statehood': Warbrick, note 119 above, 263.

¹⁷⁵ See section 4.2.2 above.

remains fluid, and the politics of the Communist revolutions is not definitive.¹⁷⁶ The fact that the People's Republic has declared itself to be a multinational unitary state, and has opted for a system of regional autonomy therein, is not conclusive. The political situation in China does and will evolve – the present regime is very different from, for instance, Mao's Cultural Revolution of the 1960s – as does the concept of sovereignty, which should not be seen as a static principle.

The absolute power of the sovereign state is now being tested in an increasing variety of ways. The monolith that was the Soviet Union disintegrated as the politics of Communism failed to bind a disparate number of composite parts, and this phenomenon finds increasing expression in the combined forces of supranationalism and sub-state nationalism. The supranational European Union provides an impetus for subsidiarity in Europe; sub-state units seek greater powers against the state and this in turn may give greater impetus to nationalist tendencies – national groups demanding self-determination 'in the form of independent statehood'.¹⁷⁷ Nationalism may have the effect of leading to independence, either peacefully or following violence, as in the case of the break-up of Yugoslavia in the 1990s,¹⁷⁸ or may lead to national parliaments within a subsisting state, such as Scotland within the United Kingdom. China is not immune from such forces, although its status as a multinational unitary state as defined in its constitution reinforces the integrationist state.¹⁷⁹

¹⁷⁶ See section 4.2.3 above.

¹⁷⁷ Gans C, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003) 3. In the EU, sub-state units are able to seek and obtain greater powers against the state because the states have given consent; in this context the consent of the state is paramount. Subsidiarity chimes with a desire for decentralisation in parts of the EU at the expense of the nation state. This finds expression, for example, in devolution for Scotland, and in ongoing claims by the Catalans, who currently have autonomous rights within Spain: with regard to the latter, see, for instance, Guibernau M, 'Spain: Catalonia and the Basque Country' (2000) 53(1) *Parliamentary Affairs* 55-68.

¹⁷⁸ See section 2.4.2.2 above.

¹⁷⁹ See note 57 above, and related text.

The emphasis of the People's Republic on territorial integrity and non-interference in its domestic affairs is jeopardised by the increasing reach of the Internet. Although China attempts to curtail the information available to its populace, a greater dissemination of news and views to the Chinese people occurs and is inevitable. The trend is for increased access of information, not only in China but throughout the world as a whole. With increasing numbers of Chinese citizens having access to the Internet, and to an increasing number of international search engines, even if the Chinese authorities are able to exert some control over the content available on the Web total control will not prove possible. A globalised information technology is a fact. One repercussion will prove to be a wider availability in China of ideas and doctrine that differ from the official Party line, for example on Tibet, resulting in an ever-increasing public scrutiny of the decision making of the state.¹⁸⁰

A broadly based dissemination of information will mean that the views on Tibet of Chinese dissidents will gain a wider audience.¹⁸¹ The official Chinese view of Tibetan history, which places Tibet firmly within China, and the events of 1950 as a liberation of Tibet, will be challenged. It is not possible to say what the outcome will be, but the challenge to the accepted position within China of Tibet will increase and be more widely apparent.

This challenge to Chinese authority already finds an opening in the context of human rights. The human rights covenants and conventions pose competition to the state, checking and controlling sovereignty and the power of the state to exert full legal

¹⁸⁰ See Hanqin Xue, note 48 above, 138.

¹⁸¹ Dissidents such as Song Liming and Shen Tong. See, for example, Song Liming, note 150 above; and Shen Tong, 'Tibet: An Unavoidable Issue' in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 41-54. This is significant as generally the Chinese Government controls the information that is disseminated to the people.

control over its boundaries and the territory therein. The work of human rights organisations criticises the actions of states on a daily basis, and in instances there is direct interference by non-governmental organisations (NGOs) within a state's territory. This can lead to conflict between NGOs, or indeed the UN, and an individual state¹⁸² or it may lead to direct participation of UN organisations within a state – for instance through the dispersal of food aid, or to separate warring factions.¹⁸³ Human rights organisations can influence the direction a state takes, and there has been criticism of human rights abuses in China¹⁸⁴ and specifically in Tibet.¹⁸⁵

A growing pressure on the integrity of the state is apparent through the forces of globalisation. 'Sovereignty' becomes less the defining characteristic of the modern state system. Although the nation state retains its pre-eminence, its supremacy is subject to challenge from a variety of directions. Yet it remains of significance and perhaps no state retains its power more than the People's Republic. It is able to do this through its seat on the UN Security Council, through its control on information within its boundaries, through its constitution and its very size. Its historic emphasis on territorial integrity¹⁸⁶ and the importance of the motherland ensure that Tibet will not easily be able to break away and form an independent nation.¹⁸⁷

It is perceived that the doctrine of state sovereignty has sacrificed Tibet, which became a 'target of Han nationalism whose external expression was Chinese

¹⁸² For instance, Zimbabwe in 2005.

¹⁸³ Such intervention by the UN happens with the consent of the state concerned. Thus prior to 2007 the UN did not directly intervene in the Sudan: see Chapter 7, note 69 below.

¹⁸⁴ For instance, in connection with the 1989 Tiananmen Square demonstrations and repression.

¹⁸⁵ Such abuses in Tibet will be considered more fully in section 5.4 below.

¹⁸⁶ Exemplified by Article 52 of the 1982 Constitution.

¹⁸⁷ Despite the unforeseen capitulation into its various parts of the former Soviet Union. Despite also the developments in respect of Kosovo, including the Comprehensive Proposal for a Kosovo Status Settlement presented by Martti Ahtisaari in March 2007, which is, in its essentials, a proposal for independence, to be supervised initially by the international community: see section 6.3.3 below.

expansionism'.¹⁸⁸ By virtue of the commitment of the People's Republic to the territorial integrity of Tibet within China and the importance of Tibet to China, emphasised by security considerations,¹⁸⁹ it is not likely that current changes in the concepts of sovereignty will improve the likelihood that the People's Republic will be prepared to willingly accede to an independent Tibet, either an independent ethnographic Tibet or with respect to an independent Tibet comprising the present TAR.

The international community has failed to recognise an independent Tibet and continues to do so; and international law and the UN Charter protect the territorial integrity of existing states,¹⁹⁰ including the People's Republic, despite changing concepts of sovereignty. It is thus in the theory of self-determination that the Tibetan nation must seek its future and it is necessary to consider in detail whether the expansion of that theory will lead to a reconsideration of the status of Tibet. In this context it is appropriate to consider the nexus between self-determination and human rights, in particular because, as we have seen, the human rights covenants and conventions provide the potential to challenge the state, and to examine how the organs of the Chinese state have oppressed the lives of the Tibetan people.

¹⁸⁸ Dawa Norbu, note 57 above, 95.

¹⁸⁹ See section 4.4.2.2 above.

¹⁹⁰ See, for instance, Article 2(4) of the UN Charter.

5 Human Rights in the Sino-Tibetan Context

5.1 Introduction

The international human rights movement gained momentum at the end of the Second World War and was first given ‘formal and authoritative expression’ by the 1945 United Nations Charter,¹ whereby the peoples of the United Nations determined ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small’.² Impetus had been given to the movement by the atrocities committed during the War and the revelations emanating from the Nuremberg war trials, and ‘the protection of human rights has largely been a result of the post-war settlement’.³

The Charter makes various references to human rights,⁴ yet these references are essentially aspirational rather than substantive. Arising from the Charter, however, the Commission on Human Rights was established by the Economic and Social Council (ECOSOC), itself an organ of the United Nations, in 1946.⁵ The Commission is rightly said to have evolved to be ‘the world’s single most important human rights organ’,⁶ and the UN High Commissioner for Human Rights, currently Louise Arbour,

¹ Steiner HJ and Alston P, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Second Edition (Oxford: Oxford University Press, 2000) 137.

² Preamble to the United Nations Charter.

³ Galbreath DJ, ‘Dealing with Diversity in International Law: Self-Determination and Statehood’ (2005) 9(4) *International Journal of Human Rights* 539-550, 548. See also Steiner and Alston, note 1 above, 112, 115, 137.

⁴ In the Preamble, note 2 above, and also in Articles 1(3), 13(1)(b), 55, 56, 62(2) and 68.

⁵ Under Article 68 of the UN Charter, ECOSOC has power to ‘set up commissions in economic and social fields and for the promotion of human rights’. The Commission on Human Rights was established by Resolution of the Economic and Social Council of 16 February 1946 (document E/20 of 15 February 1946). See also Harris DJ, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004) 658.

⁶ Steiner and Alston, note 1 above, 138. The Commission in 2006 became the UN Human Rights Council by UNGA Resolution 60/251 dated 15 March 2006, which reaffirmed, inter alia, ‘that all

former member of the Supreme Court of Canada, remains the principal United Nations Commissioner responsible for United Nations activities in the field of human rights, with a wide mandate to promote all human rights, be they civil and political or economic, social and cultural.⁷

The United Nations system in respect of human rights incorporates a number of Charter bodies⁸ as well as seven human rights treaty bodies.⁹ In addition there are several other important United Nations bodies concerned with the promotion and protection of human rights,¹⁰ and many agencies and partners of the United Nations are also involved in this regard.¹¹ Regional human rights mechanisms also exist, such as the African Commission on Human and People's Rights in Africa and the European Court of Human Rights in Europe, together with thousands of human rights non-governmental organisations (NGOs), such as Asia Human Rights Commission¹² and the Asia-Pacific Forum.¹³

human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing' and further recognised 'the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization' – see though section 5.2 below. The Commission was abolished on 16 June 2006 accordingly. China did not oppose the GA resolution.

⁷ OHCHR [Office of the United Nations High Commissioner for Human Rights], 'The High Commissioner' (2006)

<<http://www.ohchr.org/english/about/hc/index.htm>>, accessed 11 April 2006.

⁸ The Human Rights Council, the Commission on Human Rights, Special procedures of the Commission on Human Rights and the Sub-Commission for the Promotion and Protection of Human Rights. See OHCHR [Office of the United Nations High Commissioner for Human Rights], 'Human Rights Bodies: Mechanisms for the protection and promotion of human rights' (2006)

<<http://www.ohchr.org/english/bodies/>>, accessed 11 April 2006. See note 6 above as to the Commission on Human Rights.

⁹ Ibid: the seven bodies are identified as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination Against Women, the Committee Against Torture, the Committee on the Rights of the Child and the Committee on Migrant Workers.

¹⁰ Ibid: these bodies include the United Nations General Assembly, the Third Committee of the General Assembly, the Economic and Social Council and the International Court of Justice.

¹¹ Ibid: for example, the United Nations High Commissioner for Refugees, the Office for the Coordination of Humanitarian Affairs, the International Labour Organization and the United Nations Development Programme.

¹² <www.ahrchk.net>.

¹³ <www.asiapacificforum.net>.

Set against the background of what is now a huge number of human rights bodies are the two principal human rights treaties: the International Covenant on Civil and Political Rights (ICCPR)¹⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁵

5.2 Priorities under the Human Rights Regime

5.2.1 *Universalism and Relativism*

The essential purpose of the human rights regime is ‘to promote and protect vital human interests’,¹⁶ a purpose made evident in the Preamble to each of the two 1966 International Covenants. The similar wording of the two preambles refers to the principle that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ and recognises ‘that these rights derive from the inherent dignity of the human person’. The Covenants further recognise that ‘the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights’.¹⁷

Common to both Covenants is the wording of the first sentence of Article 1(1): ‘All peoples have the right of self-determination.’ Thus primacy is given to an essentially positive human right, and not only to a positive human right but to one given to ‘peoples’ as opposed to individuals. As is evident from Chapter 2 above, this right has

¹⁴ International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

¹⁵ International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

¹⁶ Bauer JR and Bell DA, ‘Introduction’ in JR Bauer and DA Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 3-23, 3.

¹⁷ ICESCR, Preamble; see also ICCPR, Preamble.

proved to be awkward and subject to a considerable margin of interpretation despite its apparently straightforward wording. The lack of definition of 'peoples' especially has caused particular difficulty and contention.¹⁸

This primacy given to self-determination is indicative of its considerable 'historical significance for several phases of the human rights movement',¹⁹ and also its inherent position within that regime. Not all countries, however, give the Conventions the same priority or significance. The Conventions both came into force in 1976, but by way of example China did not sign the ICESCR until 27 October 1997, and did not ratify it until 27 March 2001; further, China has not even now ratified the ICCPR, although it signed that Convention on 5 October 1998.²⁰ Thus self-determination and human rights may not only mean different things to different states, but they also attract different priorities.

Questions of interpretation of human rights are important and the Universal Declaration of Human Rights (UDHR)²¹ has been central to establishing the

¹⁸ This key issue has been referred to in Chapter 2, and will be considered further in Chapter 6.

¹⁹ Steiner and Alston, note 1 above, 1248; also at 1256, quoting Orentlicher D, 'Separation Anxiety: International Responses to Ethno-Separatist Claims' (1998) 23 *Yale Journal of International Law* 1.

²⁰ Information accessed through [OHCHR] Office of the United Nations High Commissioner for Human Rights, 'Ratifications and Reservations (Last Update 8 May 2006)': <<http://www.ohchr.org/english/countries/ratification/index.htm>>, accessed 15 May 2006. Of the states that have not ratified the ICCPR, 'a disproportionate number are from Asia, including China, Indonesia, Laos, Malaysia, Myanmar, Pakistan, Saudi Arabia and Singapore': Harris, note 5 above, 678. It is on ratification (or other acceptance, approval or accession as appropriate) that a state is bound by a treaty, assuming that it has come into force: Vienna Convention on the Law of Treaties 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, Articles 11-16. See also ICCPR, Article 49. Thus, until ratification by China of the ICCPR, that treaty does not bind China. The ICCPR itself entered into force on 23 March 1976, and the ICESCR on 3 January 1976: see notes 14 and 15 above. It is of note that, 'Before joining the UN, when discussing international standards of human rights Chinese Communist leaders made known their contempt for the Western view of human rights and criticized capitalism for its emphasis on political and civil rights without regard for economic rights': Copper JF, 'Defining Human Rights in the People's Republic of China' in Yuan-li Wu, F Michael, JF Copper, Ta-ling Lee, Maria Hsia Chang, and AJ Gregor (eds), *Human Rights in the People's Republic of China* (Boulder and London: Westview Press, 1988) 9-17, 15.

²¹ The UDHR was a seminal work adopted and proclaimed on 10 December 1948 by the General Assembly of the UN by a vote of 48-0, with 8 abstentions. Member states were requested to publicise the text of the Declaration but it was only with the 1966 International Covenants that legal force was given to the rights outlined in the UDHR.

framework of the consensus achieved in respect of human rights from an international perspective. The United Nations vote on the Declaration in 1948 is notable for the lack of opposition, and in the context of this thesis it should be mentioned that PC Chang of China contributed to the drafting of the Universal Declaration.²² Despite this ‘the universality of both the notion of human rights and the nature of human rights has been, and remains, highly contested’.²³ In view of this contestation, the use of ‘universality’ attributable to human rights can be seen to be something of a misnomer, and it has been argued that the UDHR should be made more ‘relevant for the present times and . . . acceptable to all nations and peoples’.²⁴

Thus relativism in respect of human rights becomes prominent, and in two senses: first between periods of time, and secondly from state to state or from region to region. As to whether human rights should be adapted from one era to another, this has the appearance of being specious. If moral values, values regarding human rights, underpin society as norms (which, if universal, they should), it is arguable that they are fundamental in nature, and should not be subject to adaptation due to, for instance, a change in the governance of certain states to dictatorship.²⁵ However, the question of ‘acceptable to all nations and peoples’ finds expression in the ‘Asian values’ debate. In this, the elites ‘of almost all East Asian countries insist that some of the rights included in the United Nations and other Western-inspired declarations of

²² Donnelly J, *Universal Human Rights in Theory and Practice*, Second Edition (Ithaca and London: Cornell University Press, 2003) 22. Note though that the People’s Republic was not seated at the UN at that time, indeed the People’s Republic had not been proclaimed, and also of course that the UN was a far smaller organisation then than it is now.

²³ Hurrell A, ‘Power, principles and prudence: protecting human rights in a deeply divided world’ in T Dunne and NJ Wheeler (eds), *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999) 277-302, 291-292.

²⁴ Per Tun Daim Zainuddin, senior adviser to the Malaysian Government, quoted in Klug F, *Values for a Godless Age: The Story of the UK’s New Bill of Rights* (London: Penguin Books, 2000) 210.

²⁵ Relevant to this is that international human rights standards are seen to impose limits on territorial sovereignty: Falk R, *On Humane Governance: Toward a New Global Politics* (Cambridge: Polity Press, 1995) 67. Thus human rights are seen as a direct challenge to the concept of sovereignty.

human rights are incompatible with their values, traditions and self-understanding, and that Western governments should be more tolerant of their attempts to define and prioritise them differently'.²⁶ The argument is that 'the conventional declarations of human rights explicitly or implicitly prescribe the standard Western liberal-democratic form of government and brook no departures from it'.²⁷

In the 1990s a backlash developed to the role played by the United Nations in standard setting with regard to human rights, 'based on a claim that alleged violations [of human rights] were being used as a pretext for a new cycle of Northern-led interventionary diplomacy', and China 'emerged as the informal leader of this movement of resistance'.²⁸ Rather than specifically temporal, the relativism relating to human rights can be viewed as political, and as cutting across states and their cultures. It is argued, as a result, that 'Human rights norms are not persuasive in and of themselves; instead they are imposed as the values of the dominant state.'²⁹ Thus the argument as to whether human rights are universal in nature, or fundamental, unchanging, or unchangeable, itself diminishes in relevance. Arguments as to the

²⁶ Parekh B, 'Non-ethnocentric universalism' in T Dunne and NJ Wheeler (eds), *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999) 128-159, 154.

²⁷ Ibid 155. Such arguments in part explain the reluctance of the People's Republic of China to ratify the ICCPR, while it has ratified the ICESCR. In essence the Chinese Government 'argues that human rights turn to some extent on cultural values and traditions, and that while the human rights movement emphasises the universality of rights, cultural differences cannot and should not be ignored. Human rights norms are inevitably subject to cultural mediation': Peerenboom R, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002) 536, footnotes omitted. Parekh, though, argues that the Chinese leaders' contention that their traditional values are incompatible with human rights is unconvincing, and further that the rejection of human rights is both self-serving and suspect: Parekh, note 26 above, 157-158.

²⁸ Falk, note 25 above, 26; see also the Bangkok Governmental Declaration, section 5.2.2 below.

²⁹ Ming Wan, *Human Rights in Chinese Foreign Relation: Defining and Defending National Interests* (Philadelphia: University of Pennsylvania Press, 2001) 12. Further, as Andrew Hurrell remarks: 'Writers such as Berlin and Elster have underlined the extent to which formal political democracy can entrench murderous majorities of all kinds – but most dangerously, perhaps, murderous ethnic majorities': Hurrell, note 23 above, 280 – see in this regard Berlin I, 'Two Concepts of Liberty' in *Four Essays on Liberty* (London: Oxford University Press, 1969), especially 165-169; Elster J, 'Majority Rule and Individual Rights' in S Shute and S Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures* (New York: Basic Books, 1993) 111-134. These words have particular resonance in the context of the Han majority and Tibetan ethnic minority, and indeed also echo in an Islamic context between Sunni and Shia Muslims.

rights and wrongs of cultural relativism similarly command less relevance,³⁰ as political realism comes to the fore, and issues of power become central. The political context of debates surrounding human rights has to be borne in mind accordingly.³¹

If human rights are perceived as a political construct, the question arises as to whether the People's Republic of China has its own concept of rights. The issue is well addressed and researched by Stephen Angle, who concludes in the affirmative, pointing to the fact that the contexts within which concepts of rights 'have emerged and have been contested are central episodes in China's cultural and political history'.³²

5.2.2 *The Bangkok Declaration*

The Chinese position on and interpretation of the Human Rights Covenants is integral to this thesis, and the following sections will focus on human rights in the context of the Chinese Constitution, and human rights in practice as operated in Tibet. It is important to recall the emphasis given by the People's Republic of China to the integrity of the state, and ancillary to this 'China has always maintained that human

³⁰ Cultural relativism may of course be the smokescreen erected by a country to maintain its power within the state; see also Chapter 2, note 73 above. The cultural relativist view whereby all moral values are relative and contingent disputes the existence of universal human rights, and is a view taken by advocates of Asian values today: Svensson M, *Debating Human Rights in China: A Conceptual and Political History* (Lanham, Maryland and Oxford: Rowman & Littlefield Publishers, Inc, 2002) 47. See also Freeman M, 'Universal Rights and Particular Cultures' in M Jacobsen and O Bruun (eds), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (Richmond, Surrey: Curzon Press, 2000) 43-58, 56: general concepts of 'Asian values' or 'Western values' as 'more likely to be smokescreens behind which those with power indulge their traditional appetite for exploitation and oppression'. The question of values as 'smokescreens' is emphasised by Andrew Hurrell, note 23 above, 297, quoting Yash Ghai, 'Through the Declaration [of the Right to Development], Asian governments seek to promote the ideology of developmentalism, which justifies repression at home and the evasion of sovereignty abroad': Yash Ghai, 'Asian Perspectives on Human Rights' in J Tang (ed.), *Human Rights and International Relations in the Asia Pacific* (London: Pinter, 1993) 54-67, 59. Although there may be legitimate values at stake, 'authoritarian regimes have at times used the rhetoric of Asian values for self-serving ends, playing the cultural card to deny citizens their rights and then fend off foreign criticism': Peerenboom, note 27 above, 115.

³¹ Svensson, *ibid*, 65-66.

³² Angle SC, *Human Rights and Chinese Thought: A Cross-Cultural Inquiry* (Cambridge: Cambridge University Press, 2002) 250.

rights are essentially matters within the domestic jurisdiction of a country'.³³ This view does not belong to China alone, but is widely held in Asia. Hence the Bangkok Governmental Declaration of 1993 emanating from a regional meeting of Asian countries prior to the Second World Conference on Human Rights held in Vienna later that year.³⁴ Paragraph 7 of the Declaration stressed the universality of human rights, but against that paragraph 8 recognised that human rights 'must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds', paragraph 9 recognised that 'States have the primary responsibility for the promotion and protection of human rights', and paragraph 5 emphasised 'the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States'. Further, while reiterating in paragraph 12 that 'self-determination is a principle of international law and a universal right recognized by the United Nations for peoples under alien or colonial domination and foreign occupation . . . and that its denial constitutes a grave violation of human rights', the Declaration, in paragraph 13, stresses 'that the right to self-determination is applicable to peoples under alien or colonial domination and foreign occupation, and *should not be used to undermine the territorial integrity, national sovereignty and political independence of States*'.³⁵ Thus

³³ Steiner and Alston, note 1 above, 548; also see Chapter 4 above. Following from this, that, by virtue of Article 2(7) of the UN Charter, the UN are not entitled to intervene in matters that are essentially within the domestic jurisdiction.

³⁴ '[C]ertain world leaders of the economically successful societies of South-East Asia . . . took the opportunity presented by the UN World Conference on Human Rights that was held in Vienna in June 1993 to assert the propriety of culturally diverse interpretations of human rights principles', and thus Western liberals were faced with 'a new challenge to the idea of universal human rights': Freeman M, note 30 above, 44. See also, though, Chan J, 'Thick and Thin accounts of Human Rights' in M Jacobsen and O Bruun (eds), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (Richmond, Surrey: Curzon Press, 2000) 59-74, 59: 'In the Bangkok Declaration, many Asian governments explicitly affirm universal human rights.'

³⁵ World Conference on Human Rights, 'Report of the Regional Meeting for Asia of the World Conference on Human Rights', Bangkok, 29 March-2 April 1993; Rapporteur: Mr LM Singhvi (1993):

the Bangkok Declaration qualified the universality of human rights, and at the same time the principle of self-determination, reflecting the Asian interpretation.³⁶

5.3 The Chinese Constitution and Human Rights

Against this background, the present Constitution of the People's Republic of China³⁷ merits examination, and in this section I will review the Constitution by reference to China's stance with regard to human rights. I will then touch upon further relevant legislation of the Chinese state before, in the final part of the section, considering to what extent the People's Republic has been brought within the international human rights regime.

5.3.1 The 1982 Constitution

The 1982 Constitution came into force in the same year that the People's Republic of China became a member of the United Nations Commission on Human Rights,³⁸ and subsequently its Sub-Commission.³⁹ The 1980s proved to be a decade during which China progressively participated in the international human rights regime, including

<<http://193.194.138.190/html/menu5/wcbangk.htm>>, accessed 15 May 2006 (emphasis added). See also Steiner and Alston, note 1 above, 549. So far as paragraph 5 is concerned, Tsering Shakya comments that in Bangkok China succeeded in gaining 'the support of all the Asian countries (except Japan) in endorsing the principle that human rights concerns should be guided by the principles of non-interference in the internal affairs of a state, and that it should stress the priority of collective rights over individual rights': Tsering Shakya, *The Dragon in the Land of the Snows: A History of Modern Tibet Since 1947* (London: Pimlico, 1999) 435.

³⁶ The Bangkok Declaration therefore presented a challenge to 'what was perceived as a western concept of human rights. . . . However, the universality of human rights and its place beyond the limits of domestic jurisdiction were reaffirmed by the Vienna Declaration and Programme of Action on Human Rights 1993 that was adopted by the Vienna World Conference': Harris, note 5 above, 657. Accordingly, it seems that customary international law is wider than that reflected in the Bangkok Declaration.

³⁷ The current Constitution was adopted on 4 December 1982. Constitutions do not have the same meaning or intent, though, in all states, and 'one should view China's constitutions not as contracts between the governing and the governed, but as manifestos proclaiming values, aspirations and goals': Copper, note 20 above, 13.

³⁸ See UNHCHR [United Nations High Commissioner for Human Rights], 'Membership of the Commission on Human Rights' (2006)

<<http://www.unhchr.ch/html/menu2/2/chrmem.htm>>, accessed 7 June 2006.

³⁹ See Foot R, *Rights Beyond Borders: The Global Community and the Struggle over Human Rights in China* (Oxford: Oxford University Press, 2000) 96.

ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴⁰ yet it was also a decade which culminated in the force used at Tiananmen Square in Beijing on 4 June 1989 and severe repression in Tibet from 1987 to 1990, with the establishment of martial law in Tibet on 7 March 1989.⁴¹

Nevertheless, the 1982 Constitution makes specific references to human rights. These are principally contained in Chapter II of the Constitution,⁴² and by Article 33 all citizens of the People's Republic are equal before the law.⁴³ This article was amended by item 8 of the Fourth Amendment to the Constitution,⁴⁴ by an additional paragraph stating: 'The State respects and preserves human rights.' Article 34 provides the right to vote and to stand for election⁴⁵ and by Article 35 citizens 'enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration'.⁴⁶ Article 36 provides freedom of religious belief,⁴⁷ and freedom of the person is protected by Article 37.⁴⁸ By Article 39 the home of a citizen is inviolable and unlawful search of the home is prohibited, and by Article 40 freedom and privacy of correspondence is protected.⁴⁹

⁴⁰ The People's Republic of China signed the Convention against Torture on 12 December 1986 and ratified the Convention on 4 October 1988; however, the People's Republic entered two reservations to the Convention, thus that the Chinese Government did not recognize the Committee against Torture as provided for in Article 20 of the Convention, and also that the Chinese Government did not consider itself bound by Article 30, paragraph 1 of the Convention: see in this context <<http://www.ohchr.org/english/countries/ratification/9.htm>>, accessed 7 June 2006. See also Foot, note 39 above, 256. Earlier in the decade China had ratified the Convention on the Elimination of All Forms of Discrimination against Women (on 4 November 1980) and acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (on 29 December 1981), both with reservation and declaration: respectively <<http://www.un.org/womenwatch/daw/cedaw/states.htm>> and <<http://www.ohchr.org/english/countries/ratification/2.htm>>, each accessed 7 June 2006.

⁴¹ See, for example, Foot, note 39 above, 97-101.

⁴² Entitled 'The Fundamental Rights and Duties of Citizens'.

⁴³ Reflecting Article 7 of the UDHR and Article 14 of the ICCPR.

⁴⁴ Approved on 14 March 2004 by the 10th National People's Congress at its 2nd Session.

⁴⁵ Note Article 21 of the UDHR and Article 25 of the ICCPR.

⁴⁶ See Article 19 of the UDHR and Articles 19, 21 and 22 of the ICCPR.

⁴⁷ See Article 18 of the UDHR and Article 18 of the ICCPR.

⁴⁸ See Article 3 of the UDHR and Article 9 of the ICCPR.

⁴⁹ See Article 12 of the UDHR and Article 17 of the ICCPR.

Article 42 grants citizens the right to work,⁵⁰ while Article 43 grants citizens a right to rest.⁵¹ By Article 45 the old, ill or disabled have the right to material assistance from the state,⁵² and Article 46 provides a right to receive education.⁵³ Article 47 grants the right, inter alia, to engage in cultural pursuits,⁵⁴ and Article 48 grants equal rights to women.⁵⁵

Article 51 is of importance: **‘The exercise by citizens of the People’s Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens’.**⁵⁶ In the context of Tibet, also of importance are Articles 52 and 54 respectively, whereby it is the duty of citizens of the People’s Republic **‘to safeguard the unity of the country and the unity of all its nationalities’** and **‘to safeguard the security, honour and interests of the motherland’**; they must not commit acts detrimental to the security, honour and interests of the motherland’.⁵⁷

There are other provisions of the Constitution that are of interest so far as human rights are concerned. Article 4 provides that all nationalities within the People’s Republic are equal, and that ‘The people of all nationalities have the freedom to use

⁵⁰ As amended by item 10 of the Second Amendment to the Constitution, approved on 29 March 1993 by the 8th National People’s Congress at its 1st Session. See Article 6 of the ICESCR.

⁵¹ See Article 24 of the UDHR and Article 7(d) of the ICESCR.

⁵² Compare Article 22 of the UDHR and Article 9 of the ICESCR, whereby everyone should have rights, for example, of social security.

⁵³ See Article 26 of the UDHR and Article 13 of the ICESCR.

⁵⁴ See Article 27 of the UDHR and Article 15 of the ICESCR. Note also Article 119 of the Constitution regarding organs of self-government in national autonomous areas administering, among other things, cultural affairs in their areas: see section 3.5.2 above. Further, by Article 22 of the Constitution, ‘the State protects . . . valuable cultural monuments and relics and other important items of China’s historical and cultural heritage’.

⁵⁵ See the UDHR, which reflects throughout the equality of all persons, Article 3 of the ICESCR, Articles 3 and also 26 of the ICCPR.

⁵⁶ Emboldened text in original. Though note the limitation imposed by Article 29 of the UDHR: ‘Everyone has duties to the community . . . (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society’.

⁵⁷ Emboldened text in original.

and develop their own spoken and written languages, and to preserve or reform their own ways and customs.’⁵⁸ By Article 5, ‘no organization or individual may enjoy the privilege of being above the Constitution and the law’, and further that no law shall contravene the Constitution. Article 2 provides that ‘**All power in the People’s Republic of China** belongs to the people’,⁵⁹ and by Article 3 the National People’s Congress and the local people’s congresses are subject to their supervision.⁶⁰ Private property is protected by Article 13 of the Constitution.⁶¹ As final points, by Article 24 the state ‘combats the decadent ideas of capitalism and feudalism’,⁶² and by Article 25 it promotes family planning.

No mention is made of human rights in the Preamble to the Constitution, yet certain rights were specifically granted, particularly in Chapter II. Such rights have the protection of the law.⁶³ Although in terms ‘human’ rights were not provided for in the 1982 Constitution as originally drafted, they are now emphasised following the specific reference in the Fourth Amendment of 14 March 2004 to the state respecting and preserving human rights.⁶⁴ It is pertinent to ask whether this relevance of human rights is reflected in other legislation applicable in the People’s Republic, and this is the subject of the next part of the chapter.

⁵⁸ Equality of nationalities is safeguarded by Article 89(11) through the functions of the State Council. Provisions regarding self-government and national autonomous areas (Articles 112ff) are considered above at section 3.5.2.

⁵⁹ Emboldened text in original.

⁶⁰ It is noteworthy that the state finds its definition in Article 9 as ‘the whole people’.

⁶¹ As amended by item 6 of the Fourth Amendment to the Constitution, approved on 14 March 2004.

⁶² One reason for the 1950 invasion of Tibet was to liberate the people from feudalism: see sections 3.2.3 and 3.4 above.

⁶³ See for example Article 4 (which prohibits discrimination against and oppression of any nationality) and Article 89.

⁶⁴ Impliedly including, for instance, the individual’s right to life, and freedom from torture and slavery: note also Articles 3-5 of the UDHR and Articles 6-8 of the ICCPR.

5.3.2 Legislation and White Papers

Individuals are able to take action against the state under administrative law. In China, Article 41 of the 1982 Constitution is of relevance by virtue of the rights it grants,⁶⁵ but not until 1990 was a general law enacted enabling individuals to take legal action against the administration. The Administrative Litigation Law was promulgated in 1989 and became effective on 1 October 1990.⁶⁶ Also in 1990 two further pieces of legislation relating to safeguards and remedies against the administration were promulgated: the Regulations on Administrative Reconsideration⁶⁷ and the Regulations on Administrative Supervision in the People's Republic of China,⁶⁸ the latter being replaced in 1997 by the Law on Administrative Supervision⁶⁹ and the former in 1999 by the Law on Administrative Reconsideration.⁷⁰ In addition the State Compensation Law took effect in 1995⁷¹ and the Law on Administrative Penalties in

⁶⁵ Article 41 states, inter alia: 'Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary'; further, 'Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law'.

⁶⁶ Adopted by the Seventh National People's Congress on 4 April 1989. Accessed at <<http://www.cecc.gov/pages/newLaws/adminLitigationENG.php>>, 9 June 2006.

⁶⁷ Adopted at the 71st Meeting of the State Council on 9 November 1990, effective on 1 January 1991. The Regulations were amended on 9 October 1994. Accessed at <<http://www.humanrights.cn/zt/lawsandregulations/2005120051229152224.htm>>, 12 September 2007.

⁶⁸ Adopted at the 72nd Meeting of the State Council on 23 November 1990. See Buhmann K, *Implementing human rights through administrative law reforms: The potential in China and Vietnam* (Copenhagen: Jurist- og Økonomforbundets Forlag, 2001) 339.

⁶⁹ Adopted on 9 May 1997 at the 25th Session of the Eighth National People's Congress Standing Committee, promulgated by President Jiang Zemin on the same date. Accessed through <<http://lehmanlaw.com/resource-centre/laws-and-regulations/administration.htm>>, 12 September 2007.

⁷⁰ Adopted on 29 April 1999 at the 9th Session of the Standing Committee of the Ninth National People's Congress. It became effective as of 1 October 1999. Accessed at <http://www.zhb.gov.cn/english/law_detail.php3?id=53>, 9 June 2006.

⁷¹ Adopted on 12 May 1994 at the 7th Session of the Standing Committee of the Eighth National People's Congress. It became effective from 1 January 1995. Accessed at <<http://www.humanrights.cn/zt/lawsandregulations/20051200629160715.htm>>, 12 September 2007. See in this regard Shelton D, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999) 65, and regarding both the Administrative Litigation Law of 1990 and the State Compensation Act, especially re the scope of compensation etc, 'Right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms', Report of the Secretary-General prepared pursuant to Commission resolution 1995/34, E/CN.4/1996/29, 27 November 1995 (UNHCR): Report accessed on 12 September 2007 at <<http://daccessdds.un.org/doc/UNDOC/GEN/G95/146/22/PDF/G9514622.pdf>>.

1996.⁷² It is of particular note that such legislation did not follow immediately on the 1982 Constitution but that it did follow in the aftermath of the events of Tiananmen Square in June 1989. The role of the criminal law is also of relevance and, for instance, by Article 251 of the Criminal Law, infringements of the right to freedom of religious belief are penalised.⁷³

In 1991 the Chinese Government issued a White Paper on 'Human Rights in China'.⁷⁴ The 1991 White Paper, containing statements of a political stance, essentially provides a historical résumé of China's basic position and practice on human rights; it does not in and of itself grant human rights *de novo* to the populace. The Preface, for instance, states that 'The issue of human rights has become one of great significance and common concern in the world community' but goes on to state that 'the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development'. A relativist stance is taken, and the document itself takes on the appearance of a defensive justification of the People's Republic to the outside world. The Preface further specifies that 'The various civic rights prescribed in the Constitution and other state laws are in accord with what people enjoy in real life. China's human rights legislation and policies are endorsed and supported by the people of all nationalities and social strata and by all the political parties, social organizations and all walks of life.' The Preface finally refers to the long-term task of

⁷² Adopted by the Eighth National People's Congress on 17 March 1996, effective from 1 October 1996. Accessed at <<http://www.cecc.gov/pages/newLaws/adminPunishmentENG.php>>, 9 June 2006. See generally, in this context, regarding the various laws and regulations aforementioned, Buhmann, note 68 above, 338-340.

⁷³ Information Office of the State Council of the People's Republic of China, 'White Paper: Freedom of Religious Belief in China' (2003) 36(3) *Chinese Law and Government* 7-20, 12. Further, at 17: 'The Law of the People's Republic of China on National Regional Autonomy stipulates: "Organs of self-government in ethnic regional autonomous areas protect the right to freedom of religious belief of the citizens of all ethnic groups".'

⁷⁴ Published through the Information Office of the State Council of the People's Republic of China in November 1991, and available at <<http://www.china.org.cn/e-white/7/index.htm>>.

‘the Chinese people and government to continue to promote human rights and strive for the noble goal of full implementation of human rights as required by China’s socialism’. Hence the aim of implementation of human rights in China is circumscribed by the requirements of the socialist state.

The White Paper states that ‘the most important of all human rights’ is the ‘right to subsistence’, and ‘to protect the people’s right to subsistence and improve their living conditions remains an issue of paramount importance today’.⁷⁵ The White Paper moves on to illustrate that the Chinese people have gained extensive political rights,⁷⁶ that they enjoy economic, cultural and social rights,⁷⁷ and freedom of religious belief.⁷⁸ There is guarantee of human rights in China’s judicial work, showing that ‘China attaches great importance to human rights protection in the administration of justice’,⁷⁹ and it is of interest that ‘political prisoners do not exist in China’.⁸⁰ Certain guarantees are outlined: the right to work,⁸¹ the rights of the disabled,⁸² and the rights of the minority nationalities.⁸³ The last-mentioned is of relevance to Tibet, and the White Paper states: ‘In New China the political rights of minority nationalities are ensured.’⁸⁴ Further, ‘Thanks to the democratic reform, the minority nationalities, oppressed for generations, obtained the freedom of person and human dignity, won basic human rights and for the first time became masters of their own destiny.’⁸⁵ Finally, the White Paper includes reference to Family Planning and Protection of

⁷⁵ 1991 White Paper on ‘Human Rights in China’, *ibid*: Part I.

⁷⁶ *Ibid*: Part II.

⁷⁷ *Ibid*: Part III.

⁷⁸ *Ibid*: Part VI.

⁷⁹ *Ibid*: Part IV.

⁸⁰ *Ibid*: Part IV, section 4. See, however, in this context, section 5.4.1 below.

⁸¹ *Ibid*: Part V.

⁸² *Ibid*: Part IX.

⁸³ *Ibid*: Part VII.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*. While China has ethnic law to guarantee the rights of ethnic minorities, minorities must demonstrate political loyalty to the state: see Sautman B, ‘Ethnic Law and Minority Rights in China: Progress and Constraints’ (1999) 21(3) *Law and Policy* 283-314, 284.

Human Rights⁸⁶ and to Active Participation in International Human Rights Activities.⁸⁷

In September 1992 the Information Office of the State Council of the People's Republic of China published a further White Paper entitled 'Tibet – Its Ownership and Human Rights Situation'.⁸⁸ Again, in the Preface, it is emphasised that the purpose of the document is to present 'the facts' to the world. It is a historical and political presentation – a document of social propaganda, not a document granting rights or signifying a change of policy.⁸⁹ The document was published subsequent to repression in Tibet in the late 1980s, and in Part One justifies China's historical claims to Tibet while at the same time commenting on the origins of 'so-called Tibetan independence' and the separatist activities of the Dalai Lama.⁹⁰ It emphasises that for 'more than 700 years the central government of China has continuously exercised sovereignty over Tibet'⁹¹ and that Tibetan independence 'brooks no discussion'.⁹² The integrity of the motherland and Chinese patriotism are stressed in the document: 'Historical facts over more than a century clearly demonstrate the so-called "Tibetan independence" was, in reality, cooked up by old and new imperialists out of their crave [sic] to wrest Tibet from China.'⁹³ Part Two of the White Paper contains various sections, including those entitled 'The People Gain Personal

⁸⁶ 1991 White Paper on 'Human Rights in China', *ibid*: Part VIII.

⁸⁷ *Ibid*: Part X. See also section 5.3.3 below.

⁸⁸ Available at <<http://www.china.org.cn/e-white/tibet/index.htm>>.

⁸⁹ The document is therefore of limited significance for this thesis, yet is indicative of the stance taken towards Tibet by the People's Republic.

⁹⁰ These activities include: publicly advocating that Tibet is an independent state; setting up the government in exile; reorganising the 'armed rebel forces'; and spreading 'rumors and calumnies and plotting riots': 'The Dalai's words and deeds have showed [sic] that he is no longer only a religious leader as he claims. On the contrary, he has become the political leader engaged in long-term divisive actions abroad' – 1992 White Paper, 'Tibet – Its Ownership and Human Rights Situation', Part One, section III.

⁹¹ *Ibid*: Part One, section II.

⁹² *Ibid*: Part One, section III.

⁹³ *Ibid*: Part One, section II.

Freedom’,⁹⁴ ‘The People Enjoy Political Rights’,⁹⁵ ‘Economic Development and Improvement of Living Standards’,⁹⁶ ‘Freedom of Religious Belief’,⁹⁷ and ‘Development of Education and Culture’.⁹⁸

Apart from the significant White Papers mentioned, China issues annual White Papers delineating progress in China’s human rights cause, for example in 2004 following the Fourth Amendment to the Constitution.⁹⁹ Again the purpose is ‘To help the international community toward a better understanding of the human rights situation in China’.¹⁰⁰ If anything, all the White Papers referred to indicate a relativist stance to human rights from a political standpoint and it is thus of interest to note how the People’s Republic interrelates with the international human rights regime.

5.3.3 China and the International Human Rights Regime

As the state has a distinct role as the controller and also the disseminator of power, and thus has the ability to extend rights,¹⁰¹ and therefore to curtail and repress rights, it is instructive to consider how the People’s Republic of China engages with the international human rights regime: how it perceives itself to be engaging and how others view its commitment.

Both Confucianism and Chinese Marxism influence the Chinese doctrine of human rights.¹⁰² Thus the collective interests of the family and society are placed above the

⁹⁴ Ibid: Part Two, section V.

⁹⁵ Ibid: Part Two, section VI.

⁹⁶ Ibid: Part Two, section VII.

⁹⁷ Ibid: Part Two, section VIII.

⁹⁸ Ibid: Part Two, section IX.

⁹⁹ See section 5.3.1 above in respect of the Fourth Amendment to the Constitution.

¹⁰⁰ See China Daily, ‘China publishes white paper on human rights progress’ (2004)

<http://www.chinadaily.com.cn/english/doc/2004-03/30/content_319176.htm>, accessed 9 June 2006.

¹⁰¹ Galbreath, note 3 above, 541.

¹⁰² See sections 2.3.3 and 3.2.3 above.

interests of the individual.¹⁰³ Ultimately ‘the stress of the interest of the state, society and nation over and above the rights of individuals has reflected the Marxist conviction that individual rights can only be fully realised within a strictly collective context’.¹⁰⁴ Yet, at the same time, it can be said that where the state is intolerant of opposition, i.e. where the state perceives that its own interest is paramount, that very factor may be ‘inconsistent with traditional communal values’.¹⁰⁵ It is of import for individual and collective human rights within China that China engages with the international human rights regime, and indeed that there is reciprocal engagement. This need for reciprocity argues against a relativist approach to human rights, for ‘the traditional culture advanced to justify cultural relativism far too often no longer exists’.¹⁰⁶

It should not be supposed that Confucianism is incompatible with human rights,¹⁰⁷ and China has stated in the United Nations, in 2004, that ‘Human rights norms . . . must be the guiding principles for the establishment of a just international and social order’.¹⁰⁸ This comment was made by the Representative of China in the introduction to the draft resolution concerning the impacts of globalisation on human rights co-sponsored by China.¹⁰⁹ China also for instance stresses the importance of international co-operation in respect of the Rights of the Child and maintains that impediments to

¹⁰³ Weatherley RD, *The Discourse of Human Rights in China: Historical and Ideological Perspectives* (Unpublished PhD Thesis: University of Newcastle upon Tyne, 1997) 245.

¹⁰⁴ Ibid 211. See also section 2.3.3 above.

¹⁰⁵ Yash Ghai, ‘Human Rights and Governance: The Asia Debate’ (1994) 15 *Australian Yearbook of International Law* 1, 5, quoted in Steiner and Alston, note 1 above, 550-552, 552.

¹⁰⁶ Donnelly J, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press, 1989) 119, quoted in Steiner and Alston, note 1 above, 552-553, 553.

¹⁰⁷ Chan J, ‘A Confucian Perspective on Human Rights for Contemporary China’ in JR Bauer and DA Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 212-237, 237.

¹⁰⁸ Qiang Chen, ‘Chinese Practice in Public International Law: 2004(II)’ (2005) 4(2) *Chinese Journal of International Law* 607-645, 625; see also Summary Record of the 51st Meeting of the CHR, E/CN.4/2004/SR.51 (16 April 2004) 21, paras 114-115.

¹⁰⁹ E/CN.4/2004/L.35.

the full attainment of women's equality should be eliminated.¹¹⁰ At the same time, China believes there is an imbalance between economic, social and cultural rights, on the one hand, and civil and political rights, on the other. The People's Republic takes the view that greater priority should be given to the former than currently is the case.¹¹¹ As to civil and political rights, these are said to be 'linked closely to economic, social and cultural rights and the right to development, and that their realization would be a gradual process that required resources and capacity-building'.¹¹²

China thus engages with the international community in respect of human rights matters, yet has still to ratify the ICCPR. Paragraph 9 of the Joint Statement of the 7th China-EU Summit, held in The Hague on 8 December 2004, can be seen to have relevance in this regard:

The Leaders believed that the China-EU human rights dialogue promoted mutual understanding and agreed to continue this dialogue, while making efforts to achieve more meaningful and positive results on the ground, as well as the related bilateral cooperation programme. They underlined their respect for international human rights standards provided for in relevant human rights instruments, including on the rights of minorities, and their commitment to co-operate with UN human rights mechanisms. In this respect, China is committed to the ratification of the International Covenant on Civil and Political Rights (ICCPR) as soon as possible. . . . The Leaders underlined the importance of concrete steps in the field of human rights and reaffirmed their

¹¹⁰ Qiang Chen, note 108 above, 626-627.

¹¹¹ Ibid 624; see also Summary Record of the 26th Meeting of the CHR, E/CN.4/2005/SR.26 (30 March 2005) 17, paras 85-86.

¹¹² Ibid 623.

commitment to further enhance co-operation and exchanges in this field on the basis of equality and mutual respect.¹¹³

China is not then a state on the periphery of the human rights debate, and it clearly plays its part in the work of international agencies,¹¹⁴ engaging in an international dialogue. This though does not mean there is agreement that China complies within its borders with human rights norms. Criticism comes from numerous sources, for example from other states, such as the USA, and from NGOs such as Amnesty International and Human Rights Watch.¹¹⁵ The USA has designated China as ‘a country of particular concern’ under the International Religious Freedom Act, and has for example stated that Tibetans experience societal discrimination.¹¹⁶ This is despite the fact that China’s ethnic law emphasises the rights of minorities.¹¹⁷

Consequently, having reviewed the integration of human rights into Chinese policy and noted engagement of the People’s Republic of China in the international human

¹¹³ Ministry of Foreign Affairs of the People’s Republic of China, ‘Joint Statement of the 7th China-EU Summit’ (2004)

<<http://www.fmprc.gov.cn/eng/wjdt/2649/t174512.htm>>, accessed 29 March 2006. The EU in the 8th EU-China Summit in September 2005 ‘welcomed China’s commitment to ratifying the International Covenant on Civil and Political Rights (ICCPR) as soon as possible’: European Commission, ‘Joint Statement of the 8th EU-China Summit’ (2005)

<http://ec.europa.eu/comm/external_relations/news/barroso/sp05_478.htm>, accessed 7 August 2006, at para. 10. One of the stated aims of the EU’s China policy is ‘to support China’s transition to an open society based upon the rule of law and respect for human rights’: European Commission, ‘The EU’s China Policy’ (2007)

<http://ec.europa.eu/external_relations/china/intro/index.htm>, accessed 14 September 2007; concern about human rights has been a major theme in EU-China relations since the Tiananmen Square crackdown in June 1989.

¹¹⁴ Qiang Chen, note 108 above, 628.

¹¹⁵ See section 5.4 below. The reporting of the two NGOs mentioned can be accessed at, respectively, <www.amnesty.org> and <www.hrw.org>.

¹¹⁶ Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, ‘International Religious Freedom Report on Mainland China’ [7 October 2002 Report] (2003) 36(3) *Chinese Law and Government* 21-48, 38-39. What may be termed ‘civilising influences’ may lead to injustice – ‘Benevolent domination may be quite as oppressive as self-interested exploitation’: Freeman, note 30 above, 51.

¹¹⁷ Sautman, note 85 above, 286.

rights regime,¹¹⁸ it is appropriate to examine the human rights situation as it has pertained in Chinese Tibet. This will make visible whether mere lip-service is paid by the People's Republic to rights that it in turn has granted, and whether such rights are simply emphasised for political rather than practical, meritorious ends. The situation can most effectively be explained by reference to abuses that have been perpetrated by organs of the state over the Tibetan people. Although the concern of the thesis is centrally with collective rights, it is through the violation of individual human rights that concern may be manifested, and it is through violation of such individual rights that group rights may ultimately be asserted.¹¹⁹

5.4 Oppression in Tibet

Chinese oppression over the Tibetan people has taken place in four vital spheres of Tibetan life: the political, the cultural-ideological, economic, and social.¹²⁰ In an attempt to illuminate a pattern of abuse in respect of individual rights these will now be considered in turn, in the context, first, of civil and political rights, and second in the context of economic, social and cultural rights. The litany is discernible from the time of the advance of the People's Liberation Army into Tibet in 1950, and perhaps reached a peak during the Cultural Revolution,¹²¹ but nevertheless continues down to the present day. All these instances of human rights abuse should be seen against a

¹¹⁸ Although it has been argued that the engagement of China in the international human rights regime has not been entirely beneficial and that, for example, moves by the People's Republic to question the impartiality of the UN Commission on Human Rights 'represent an attempt to undercut the legitimacy of the body and to cast it as a tool of the developed West': Foot, note 39 above, 270.

¹¹⁹ Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition (Philadelphia: University of Pennsylvania Press, 1996) 117.

¹²⁰ Dawa Norbu, *China's Tibet Policy* (Richmond, Surrey: Curzon Press, 2001) 386.

¹²¹ The Cultural Revolution started in 1966 and continued until 1976. Abuses in China during this period were not confined to Tibet, and the Cultural Revolution 'constituted a strong attack on established institutions and patterns, including the legal system . . . [it] has been described as a period of legal nihilism and led to a time of relative isolation of the PRC from international society': Buhmann, note 68 above, 193. It also led to considerable criticism of human rights in, and of arbitrary rule of the state in, the People's Republic: see *ibid* 243.

backdrop of the three United Nations General Assembly Resolutions expressing concern for fundamental rights and freedoms in Tibet and an end to practices depriving the Tibetan people of those rights and freedoms.¹²²

5.4.1 Civil and Political Rights

Human rights are inevitably interwoven with the political process. It has been said that ‘Basic to a constitution are human rights, which define the relationship between government and society’, and further that human rights in the form of civil and political rights ‘define our rights against the government to protect us from abuse of power’, and at the same time ‘ensuring the transparency of government’.¹²³ Thus human rights operate as a control on the government, but equally government may operate as a control on and an abuse of the human rights of its people. As was seen in Chapter 3 above, the Seventeen-Point Agreement of 1951 provided that the existing political system of Tibet would not be altered and that the functions, status and power of the Dalai Lama were to remain the same.¹²⁴ However, within months of the Agreement there was evidence of interference when the two Tibetan co-prime ministers were ousted, and as the years progressed the authority of the Dalai Lama was undermined.¹²⁵

While political Tibet has the status of an autonomous region, the people enjoy no meaningful autonomy, and minority cultures within the People’s Republic ‘have been

¹²² United Nations General Assembly Resolutions 1353 (XIV) in 1959, 1723 (XVI) in 1961 and 2079 (XX) in 1965. See section 3.4.3 above generally. It may be noted that these resolutions took place before the People’s Republic was seated at the United Nations in October 1971.

¹²³ Plunk RL, *The Wandering Peacemaker* (Charlottesville, VA: Hampton Roads Publishing Company, Inc., 2000) 43. See also note 37 above regarding interpretation of China’s constitutions.

¹²⁴ Article 4 of the Agreement; see section 3.3.2 above.

¹²⁵ See section 3.4 above.

caught up in the political upheavals in the country at large in recent decades'.¹²⁶ These upheavals include, for example, the Cultural Revolution and the pro-democracy suppression of 1989. Throughout the period since 1950 the Chinese Government has, on a systematic basis, suppressed independent political activities within Tibet, initially through the use of the Seventeen-Point Agreement and later through effective direct authority under the Preparatory Committee for the Autonomous Region of Tibet, which erased the last residue of Tibet self-rule.¹²⁷

A lack of political freedom in Tibet is apparent; 87,000 were killed in the suppression of the 1959 rebellion, and in 1989 there was again repression, including the imposition of martial law.¹²⁸ Dissenting views on the sovereignty of Tibet were suppressed.¹²⁹ Oppression continues and, for example, in its World Report of 2001, Human Rights Watch commented that 'Chinese authorities continued to suppress suspected "splittist" activities in Tibet and exert control over religious institutions. Officials embarked simultaneously on campaigns to vilify the Dalai Lama and to convince the international community that Chinese policies in Tibet had ensured economic well-being and respect for human rights.'¹³⁰

¹²⁶ Hannum, note 119 above, 426.

¹²⁷ Tsering Shakya, note 35 above, 241. See also section 3.4.1 above in this regard.

¹²⁸ Cao Changching, 'Independence: The Tibetan People's Right' in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 3-23, 12.

¹²⁹ Ding Zilin and Jiang Peikun, 'Tibetans' Rights and Chinese Intellectuals' Responsibility' in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 31-35, 33.

¹³⁰ Human Rights Watch, 'World Report 2001: China and Tibet: Human Rights Developments' (2001) 6

<<http://www.hrw.org/wr2k1/asia/china.html>>, accessed 14 June 2006. Suspected separatists – splittists – continue to be imprisoned: see Human Rights Watch, *World Report 2006* (Human Rights Watch, 2006) 251. Splittism 'flaunts the flag of religion and nationalism, dividing the country': Barnett R, 'Beyond the Collaborator – Martyr Model: Strategies of Compliance, Opportunism, and Opposition Within Tibet' in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 25-66, 43, quoting from a leftist attack, in the Party newspaper in Tibet in August 1989, on proponents of liberalisation policies in the TAR. The oppression in Tibet has been referred to as 'something not far from genocide': Gray J, *Black Mass: Apocalyptic Religion and the Death of Utopia* (London: Allen Lane, 2007) 169.

In Tibet it is impossible to separate the political from the religious. Buddhism is the central force of both in Tibet.¹³¹ Consequently when considering the political oppression in Tibet it is essential to note religious oppression, which has been the hallmark of Chinese dominance over Tibet. While the Dalai Lama remained in Tibet and a part of ‘the establishment’ the Chinese Government could claim some legitimacy for their policies in Tibet, and the presence of the Dalai Lama could be seen as a protection for the Buddhist religion in Tibet under Chinese rule. However, once the Dalai Lama left Tibet in 1959 that protection disappeared and religious oppression escalated. Monasteries were destroyed, both Buddhist and Bön-Po,¹³² the economic power base of the monasteries was eroded, and the long-term aim of the People’s Republic is seen as the eradication of the monkhood as a social group.¹³³ Monasteries were ransacked, taxes were imposed on monasteries, and monks were singled out for *thamzing*, abused and imprisoned.¹³⁴

During the Cultural Revolution oppression of religion in Tibet reached its zenith and the practice of religion was outlawed. Monks suffered torture and destruction of the monasteries continued.¹³⁵ In addition there was widespread destruction of religious artefacts – not only in monasteries but also in the home. In 1959, Tibet had contained more than 600,000 monks, 4,000 incarnate lamas, and 6,524 monasteries,¹³⁶ but by

¹³¹ In Tibet there is a ‘duality of politics and religion’: Ardley J, *The Tibetan Independence Movement: Political, religious and Gandhian perspectives* (London and New York: RoutledgeCurzon, 2002) 11. Also, for Tibetans, religious freedom equals political freedom: Ding Zilin and Jiang Peikun, note 129 above, 34. Indeed it is arguable that in a pre-political era religion gives legitimacy to power: Dawa Norbu, note 120 above, 129. It is, in addition, worth noting that ‘The exile political system integrates political institutions and Buddhism’: He Baogang and Sautman B, ‘The Politics of the Dalai Lama’s New Initiative for Autonomy’ (2005) 78(4) *Pacific Affairs* 601-629, 622.

¹³² The early religion of Tibet: see Ardley, note 131 above, 10.

¹³³ Tsering Shakya, note 35 above, 254, 267.

¹³⁴ See, for instance, the vivid account in Avedon JF, *In Exile from the Land of Snows: The Dalai Lama and Tibet Since the Chinese Conquest* (New York: HarperPerennial, 1994, reissued 1997) 230-232; also for example at 92 and 221-222. For an explanation of *thamzing* see section 3.4.3 above.

¹³⁵ Avedon, *ibid*, 288-293; Tsering Shakya, note 35 above, 317.

¹³⁶ Avedon, *ibid*, 92.

the end of the Cultural Revolution only thirteen monasteries in Tibet had escaped destruction.¹³⁷

After the Cultural Revolution ended the more liberal policy of Deng Xiaoping was in ascendancy, and China sought a more conciliatory approach in Tibet.¹³⁸ There was an easing of restrictions, a certain tolerance of demands for greater religious freedom and reconstruction of monasteries.¹³⁹ Nevertheless religious institutions remain controlled. For example:

In December 1999, one of the most senior religious figures in Tibetan Buddhism, the then fourteen-year-old Karmapa, fled Tibet for India. In the wake of his escape, authorities moved his parents out of Lhasa . . . ; detained several people at Tsurphu, the Karmapa's monastery; and replaced some monks. The same week as the escape, Chinese authorities announced their recognition of another high-ranking figure, the two-year-old 7th Reting Rinpoche, thereby once again asserting a government role in the selection and installation of Tibetan religious figures. In May, authorities detained eight Reting monks who protested the choice.¹⁴⁰

¹³⁷ Tsering Shakya, note 35 above, 322 and 512 note 24. By 1965, 80% of the monasteries had been destroyed, and 'By the beginning of 1970, all the monasteries and temples had been vandalised by the Red Guards and left to ruin': *ibid* 348. The destruction was effectively a destruction of 'Tibet's separate identity', obliterating 'Tibetan distinctive characteristics': at 322 and 349.

¹³⁸ *Ibid* 371.

¹³⁹ *Ibid* 402; noting the Monlem prayer ceremony was allowed in Lhasa in 1986 for the first time in two decades; also, Barnett, note 130 above, 37. Wang Lixiong refers to restoration of temples and the fact that by the early 1990s there was little interference in religious practice of the laity: Wang Lixiong, 'Reflections on Tibet' (2002) 14 *New Left Review*, March-April, 78-111, 105.

¹⁴⁰ Human Rights Watch, 'World Report 2001', note 130 above, 6. The present Panchen Lama, second in hierarchical status only to the Dalai Lama, is a direct choice of the Chinese authorities, the incarnation proclaimed by the Dalai Lama on 14 May 1995 having been abducted by the Chinese authorities. There is still no information as to the whereabouts of the latter incarnation: Tibetan Centre for Human Rights and Democracy, '11 years on! The 11th Panchen Lama, Gendun Choekyi Nyima, still remain disappeared [sic]', Press Statement 24 April 2006 (2006) <<http://www.tchrd.org/press/2006/ps20060424.html>>, accessed 16 June 2006.

Further detention of monks and nuns ‘for their peaceful pro-independence activities’ continued into the present century.¹⁴¹

While the Chinese Constitution provides for freedom of religious belief,¹⁴² tight controls on religious practices remain. Many traditional religious practices are permitted, yet the authorities ‘promptly and forcibly suppress those activities viewed as vehicles for political dissent’.¹⁴³ Consequently religious repression continues in Tibet. Monks and nuns are subjected to imprisonment and there are reports of deaths of religious prisoners and also abuse and torture of those who are accused of political activism.¹⁴⁴

Human rights in this context include those in respect of freedom of speech and assembly. Again there are instances of abuse of these in Tibet, and they are reported on an ongoing basis.¹⁴⁵ The Annual Report 2005 of the Tibetan Centre for Human

¹⁴¹ Human Rights Watch, ‘World Report 2001’, note 130 above, 7.

¹⁴² Article 36 of the 1982 Constitution.

¹⁴³ Bureau of Democracy, Human Rights, and Labor, note 116 above, 40. In its *World Report 2006*, Human Rights Watch referred to the Chinese Regulation on Religious Affairs, effective in March 2005, codifying religious policy in effect since 1982: ‘particularly troublesome [is] . . . a requirement that religious bodies “safeguard unification of the country, unity of all nationalities, and stability of society.” This last requirement is vague enough to give the state control of any and all religious teachings and is rigorously enforced in the Tibet Autonomous Region’: Human Rights Watch, *World Report 2006*, note 130 above, 248.

¹⁴⁴ See Bureau of Democracy, Human Rights, and Labor, note 116 above, 40 and 45-47 for examples. The purpose of this thesis is not to delve into the minutiae of human rights abuses, rather in that connection to demonstrate their existence. Early findings of Chinese abuse of Tibetan human rights are outlined, for example, in International Committee of Lawyers for Tibet and Unrepresented Nations and Peoples Organization (ICLT and UNPO), *The Case Concerning Tibet: Tibet’s Sovereignty and the Tibetan People’s Right to Self-Determination* (New Delhi: Tibetan Parliamentary & Policy Research Centre, 2000) 59ff. Recent instances of persecution by the state in Tibet in the religious and political context include those reported at Human Rights Watch, ‘Trials of a Tibetan Monk: The Case of Tenzin Delek’ (2004) 16(1)(C) (February) *Human Rights Watch* 1-106, regarding particularly the arrest, treatment and sentence to death of Tenzin Delek Rinpoche, the violation of his rights, and the violation of rights and execution of Lobsang Dondrup on 26 January 2003; and those reported on the FreeTibet website, for example the detention and torture of Phuntsok Wangdu: Free Tibet Campaign, ‘Phuntsok Wangdu: Urgent Campaign – 22 July 2005’ (2005)

<<http://www.freetibet.org/campaigns/phuntsokwangdu220705.html>>, accessed 16 June 2006.

¹⁴⁵ See for instance the Free Tibet Campaign regarding the arrest of five monks and nuns ‘for involvement in the distribution and pasting of a protest letter’ calling, for example, for the independence of Tibet and for the Chinese authorities to enter into negotiations: Free Tibet Campaign, ‘Urgent Campaign – 30 January 2006: Five monks and nuns arrested for displaying Dalai Lama poster’ (2006)

Rights and Democracy (TCHRD) focuses on five spheres of rights' violation in Tibet, including civil and political liberties and religion,¹⁴⁶ and at the end of 2005 TCHRD documented '20 known arrests of Tibetans during the year for simply calling for freedom in Tibet and for showing allegiance to the Dalai Lama', i.e. for their political beliefs.¹⁴⁷ There is a focus on 'striking hard against Tibetan freedom activists and intensification of "patriotic re-education" campaign in monastic institutions in Tibet'.¹⁴⁸ 'The use of detention, arrest, and torture of large numbers of Tibetans continues to be an integral part of China's effort to suppress opposition to Chinese rule in Tibet',¹⁴⁹ and, at the 56th UN Commission on Human Rights in 2000, the Special Rapporteur on Torture's report referred to individual cases within Tibet, including instances of detentions, severe beatings and 'brutal' interrogations.¹⁵⁰

Accordingly a pattern of human rights abuse is evident in Tibet in the sphere of civil and political rights. It is apparent and ongoing, as reported to the current date. While the ICCPR has yet to be ratified by the People's Republic of China, this is not the case with the ICESCR.

<<http://www.freetibet.org/campaigns/labrang300106.html>>, accessed 16 June 2006. Amnesty International 'has said that the Chinese authorities continued to severely restrict the freedom of religion, expression and association of the Tibetan people during 2005': International Campaign for Tibet, 'Amnesty International Says Arbitrary Arrests and Unfair Trials Continue in Tibet' (2006)

<<http://savetibet.org/news/newsitem.php?id=980>>, accessed 16 June 2006.

¹⁴⁶ Tibetan Centre for Human Rights and Democracy, *Human Rights in Tibet: Annual Report 2005* (Tibetan Centre for Human Rights and Democracy, 2005).

¹⁴⁷ Tibetan Centre for Human Rights and Democracy, 'Human Rights Situation in Tibet: Annual Report 2005', Press Release 21 February 2006 (2006)

<<http://www.tchrd.org/press/2006/pr20060221.html>>, accessed 16 June 2006. See also TCHRD, note 146 above, 7.

¹⁴⁸ Tibetan Centre for Human Rights and Democracy, 'People's Republic of China high on renewing campaigns against peaceful Tibetan dissidents', Press Release 17 May 2006 (2006)

<<http://www.tchrd.org/press/2006/pr20060517.html>>, accessed 16 June 2006.

¹⁴⁹ International Campaign for Tibet, 'Tibetan Prisoners of Conscience' (2006)

<<http://www.savetibet.org/news/positionpapers/prisonersofconscience.php>>, accessed 16 June 2006.

¹⁵⁰ Government of Tibet in Exile (The), 'Sir Nigel Rodley, the Special Rapporteur on Torture's report' (2000)

<<http://www.tibet.com/UNHRC/tb-14.html>>, accessed 16 June 2006.

5.4.2 Economic, Social and Cultural Rights

It is pertinent to commence this section with reference to the 2001 White Paper entitled ‘Tibet’s March Toward Modernization’.¹⁵¹ Part I of the White Paper outlines the rapid social development in Tibet from its previous level since 1950, particularly since the democratic reform of the Tibetan social system in 1959, and sums up as follows: ‘the development history of Tibet in the past five decades since its peaceful liberation has been one of proceeding from darkness to brightness, from backwardness to progress, from poverty to prosperity and from isolation to openness, and of the region marching toward modernization as a part of the big family of China’.

Part II of the White Paper deals with Tibet’s modernisation achievements and outlines the significant progress the economy is said to have made. It refers to the growth of modern industry, the thriving of basic industries, such as energy and transportation, and the flourishing of trade and commerce, in addition to the rapid progress in education, science and technology, and medical and health care. The traditional Tibetan culture is said to have been ‘explored, protected and developed’ and the freedom of religious belief and traditional customs of the Tibetan people ‘have been respected and protected’.¹⁵² In sum, the quality of life of Tibetans has greatly

¹⁵¹ Issued by the Information Office of the State Council on 8 November 2001. Accessible at <<http://www.china.org.cn/e-white/20011108/index.htm>>. The document forms political propaganda for a foreign audience and is not intended as a harbinger of new legislation. The tenor of the document is made clear in the concluding words of the Foreword to the White Paper: ‘This year is the 50th anniversary of the peaceful liberation of Tibet. Looking back on the course of modernization since its peaceful liberation, publicizing the achievements in modernization made by the people of all ethnic groups in Tibet through their hard work and with the support of the Central Government and the whole nation, and revealing the law of development of Tibet’s modernization – these will contribute not only to accelerating the healthy development of Tibet’s modernization but also to clearing up various misunderstandings on the “Tibet issue” in the international community and promoting overall understanding of the past and present situations in Tibet.’

¹⁵² This though is a protection and development not by the people whose culture is in point, the Tibetans, but by Han Chinese government elites. See, in this context, Freeman, note 30 above, 48.

improved: ‘it is beyond doubt that the development of Tibet in the past half century has greatly changed its former poor and backward features, and laid a solid foundation for realizing a leapfrog development in its modernization drive’.¹⁵³

Part III of the White Paper specifically raises the political and postulates that ‘The modernization drive of Tibet has been forging ahead consistently during the protracted struggle against the Dalai Lama clique and international *hostile forces*’.¹⁵⁴

Thus this section of the thesis aims to clarify whether the life of Tibetans has greatly improved in the last half-century – whether the ‘forging ahead’ has in fact benefited Tibetans.

From an economic point of view, the influx of Han Chinese into Tibet during the period in question is of significance. Since 1984 Han Chinese have been free to enter Tibet for purposes of business and trade and there has been significant population transfer as a result, particularly resulting from a migration surge in the mid-1990s. There is now a flourishing Chinese community within Tibet, which dominates the Tibetan economy, although at the same time it must be said that a skilled workforce was needed as a result of a lack of skills among Tibetans themselves.¹⁵⁵ This has led to a dominance of Han Chinese in both the business and economic spheres. They have provided the entrepreneurship and have reaped the rewards within a developing economy. This raises various issues: the right to work,¹⁵⁶ and whether Tibetans suffer detriment in this regard bearing in mind the influx of Han Chinese; questions of

where the author gives the example of Chinese Communist elites being culturally distinct from the Tibetans whom they govern, and also 53, where the point is made that the instrument of the state may be used ‘for the oppression and destruction of cultures’.

¹⁵³ ‘Tibet’s March Toward Modernization’, note 151 above, Part II.

¹⁵⁴ Emphasis added.

¹⁵⁵ Tsering Shakya, note 35 above, 94, 395, 404-405, 438. See section 4.4.2.1 above regarding Han migration into both the TAR and ethnographic Tibet as a whole.

¹⁵⁶ See Article 42 of the 1982 Constitution (as amended), and also Article 6 of the ICESCR.

education,¹⁵⁷ for instance whether the education system has held back Tibetans within their own territory, thus making it more difficult for them to find well-paid work, or indeed work at all; and issues as to whether the migration influx has adversely impacted on Tibetans' standard of living or way of life.

These issues are of significance because an objective of the People's Republic of China has been to promote social reforms and bring Tibet within the ambit of the social system of China, which in turn is associated with the stress given by the People's Republic to collective rights over and above individual rights.¹⁵⁸ Further, in recent years particularly China has sacrificed economic, social and cultural rights to market-driven growth, and thus the state's commitment to such rights is open to question.¹⁵⁹ The economic disparity that has opened up in Tibet¹⁶⁰ is on the face of matters detrimental to Tibetans when compared to Han Chinese, and this disparity is linked with the availability of work to individuals, and the type of work available to them.

Without emphasis on education, the economic situation is not going to improve for Tibetans, many of whom live in more rural areas which suffer greater impoverishment than urban areas, and the majority of whom are in less well paid occupation than the Han migrants.¹⁶¹ Prior to 1950 education was the responsibility principally of the

¹⁵⁷ See Article 46 of the 1982 Constitution; also Article 26 of the UDHR and Article 13 of the ICESCR.

¹⁵⁸ Tsering Shakya, note 35 above, 93 and 435, and in turn to the strengthening of the state: see, for example, Kent A, *Between Freedom and Subsistence: China and Human Rights* (Hong Kong: Oxford University Press, 1993) 38.

¹⁵⁹ Bauer and Bell, note 16 above, 7.

¹⁶⁰ Tsering Shakya, note 35 above, 446-447. It is though perhaps of relevance that Tibet has been chronically dependent on Chinese subsidy – 95%, for instance, in 1983: *ibid* 392.

¹⁶¹ Despite this, though, there is the emergence of a new social class of rich Tibetans: Yan Jiaqi, 'Federalism and the Future of Tibet' in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 107-120, 114.

monasteries,¹⁶² and by attacking and destroying the monasteries the People's Republic attacked and destroyed the educational base of the Tibetans. John Avedon reports that, from 1970 onwards, the children of Han settlers 'attended special schools, while Tibetan schools were virtually nonexistent'.¹⁶³ The Tibetan language was not studied in schools, and this created social and employment disadvantages: Chinese language thus dominated spheres of business and also governance. The failure to educate Tibetans left them at significant disadvantage accordingly.¹⁶⁴

However, the 1997 Report, 'The Next Generation', found that it was 'undeniable that the People's Republic of China has improved the public school facilities in Tibet in recent years'.¹⁶⁵ Nevertheless the Report made the point that the school facilities were mainly constructed to benefit the children of the Han settlers, and the majority of schools had therefore been built in urban areas. The Conclusion further pointed out that approximately one-third of school age children in Tibet received no education whatsoever, and that even primary school education was not free.¹⁶⁶ There were violations of international conventions concerning access to education, form of

¹⁶² See, for example, the 1997 Report of the Government of Tibet in Exile entitled 'The Next Generation – The state of education in Tibet today' (hereafter 'The Next Generation'), accessed at <<http://www.tibet.com/Humanrights/EduToday/intro.html>>, 23 June 2006, Chapter 2: 'In independent Tibet [i.e. prior to the 1950 invasion/liberation] over 6000 monasteries and nunneries served as Tibet's educational institutes in addition to lay schools.'

¹⁶³ Avedon, note 134 above, 316. At the same place he also comments: 'Closed during spring and autumn so that the children could help with the field work, those few students who could attend – their parents not requiring the extra work points earned from their labor – were often marshaled during the rest of the year to undertake road repair, cut grass, collect manure and exterminate birds and insects. The only topics covered were the Chinese language, Marxist doctrine and mathematics.'

¹⁶⁴ Note though that thousands of Tibetan children were sent (not in all cases with the willing agreement of their parents) to China to be educated. The intent was to train them for leadership within Tibet: Avedon, note 134 above, 73 and 269-271. It is arguably from these children that the 'new social class of rich Tibetans' has emerged: see note 161 above.

¹⁶⁵ Conclusion to 'The Next Generation', note 162 above, in Chapter 7 thereof.

¹⁶⁶ Completion of a full course of primary schooling is one of the eight Millennium Goals of the United Nations: <<http://www.un.org/millenniumgoals/>>, accessed 23 June 2006. In the People's Republic as a whole, in 2004 it was said that 'the national net enrollment rate in elementary schools is 98.58 percent': People's Daily Online, 'Overview' (2004) <http://english.people.com.cn/data/China_in_brief/Education/Overview.html>, accessed 7 August 2006.

education, and content of education.¹⁶⁷ The main teaching language continued to be Chinese, and thus Tibetan children remained unfavourably circumstanced in relation to their Chinese counterparts from the outset, leading to a high failure rate.¹⁶⁸ This failure rate is then reflected in work and economic prospects, leading to a continued underclass of Tibetans within Tibet.

Education in turn is linked to culture. In this context students have reported ‘that the right to freedom of religion and thought in public schools in Tibet is repressed through a variety of methods’.¹⁶⁹ Chapter 5 of the 1997 Report refers to the fact that ‘Tibetan children attending Chinese schools received almost no education about their cultural heritage’.¹⁷⁰ Thus in Chapter 7 the Report concludes: ‘this report indicates that Chinese-sponsored “education development” in Tibet not only fails to benefit the Tibetans themselves, it is also being used as a political tool to strip Tibetans of their cultural rights and dignity’.¹⁷¹ Language is of itself a means of control,¹⁷² and absolute

¹⁶⁷ See Chapters 3-5 of ‘The Next Generation’.

¹⁶⁸ Article 27 of the ICCPR has relevance in this regard: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, *or to use their own language*’ (emphasis added). This is a right conferred upon individuals and not a collective right.

¹⁶⁹ See section Fii of Chapter 4 of the 1997 Report, where examples are shown.

¹⁷⁰ See section A. This despite Article 4 of the 1982 Constitution and also Article 29(1) of the UN Convention on the Rights of the Child, whereby the ‘States Parties agree that the education of the child shall be directed to: . . . (c) the development of respect for the child’s parents, *his or her own cultural identity, language and values*, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own’ (emphasis added). This convention was ratified by the People’s Republic on 2 March 1992. See also UNGA Resolution 47/135 of 18 December 1992, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted without a vote, Article 1 providing that ‘States shall protect the existence and the national or ethnic, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.’

¹⁷¹ Attacks on Tibetan culture and identity are also reported in, for example, Tsering Shakya, note 35 above, 333, although the People’s Republic takes the view that minorities need Han Chinese for their cultural advancement: Sautman, note 85 above, 292. In any event, the Tibetan culture has proved to be resilient in the face of attack: Fang Lizhi. ‘Tibetan, Chinese, and Human Rights’ in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 37-40, 37.

¹⁷² Tsering Shakya, note 35 above, 407.

control of the media by the People's Republic of China in Tibet buttresses this control and disseminates the agenda of the Party.¹⁷³

Albeit the economy of Tibet has developed over the last half-century it appears that the greatest beneficiaries of this improvement have been Han Chinese, rather than Tibetans themselves. Tibetans may have greater economic opportunities, but these are likely to be of a menial nature, and they are hampered by the educational system that has evolved. Their economic rights are limited and their social and cultural rights denigrated. Thus it can be said that 'human rights in socialist systems are seen as determined by the state and as having no autonomous existence'.¹⁷⁴ It is evident that in Tibet cultural pursuits are tied in with religion, and thus cultural rights with civil and political rights. While the ICESCR has been ratified by China, it is apparently not complied with, particularly in the case of minorities in the People's Republic and in the case of the Tibet Autonomous Region.

5.5 Human Rights as a Challenge to Sovereignty

It is clear from the above that there have been abuses of international conceptions of human rights within Tibet, and also that the People's Republic does not abide by what may be termed 'human rights norms'. These abuses, in respect of civil and political rights, include suppression of independent political activities and a lack of political freedom, religious oppression and abuse of freedom of speech and assembly.¹⁷⁵

Abuses in the sphere of economic, social and cultural rights include those relating to

¹⁷³ Cao Changching, 'Brainwashing the Chinese' in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 25-30, 25. See also section 4.3 above re the question of China being able to exert control over the content of the Internet.

¹⁷⁴ Kent, note 158 above, 13.

¹⁷⁵ See section 5.4.1 above.

education, the Tibetan language and also economic disadvantage.¹⁷⁶ It should be emphasised that mandatory provisions in the rules of international law concerning the universal protection of human rights ‘constitute intransgressible principles of international customary law’.¹⁷⁷ The protection of fundamental rights of the human person is presupposed in the Charter of the United Nations: ‘it is apparent from Chapter I of the Charter . . . that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms’.¹⁷⁸ Thus these international rights and freedoms need to be respected by member countries of the United Nations in any event.

Two issues then appear pertinent. The first is whether there is such a thing as universality of human rights or whether human rights are dependent on cultural context, thus having a relative character. This question of universality and relativism has already been considered,¹⁷⁹ and China’s interpretation of rights can be gauged from the 1982 Constitution.¹⁸⁰ These constitutional rights will themselves prove to be subject to interpretation by the Chinese Government, by reference to the politics dominant in the People’s Republic rather than by reference to international covenants, particularly to covenants not ratified by the People’s Republic.¹⁸¹ Relativism consequently becomes not so much cultural as political, as does any question of universality of human rights.

¹⁷⁶ See section 5.4.2 above.

¹⁷⁷ Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* Judgment of the Court of First Instance of 21 September 2005, para. 231, referring in turn to the Advisory Opinion of the International Court of Justice of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996, 226, para. 79, accessible at <<http://www.icj-cij.org/docket/files/95/7495.pdf>>.

¹⁷⁸ *Kadi*, ibid, para. 228.

¹⁷⁹ See section 5.2 above.

¹⁸⁰ The rights therein have been referred to above in section 5.3.1.

¹⁸¹ The ICCPR is of course one such international covenant. Ratification of the ICCPR would be an impediment to free interpretation by the People’s Republic of its Constitution, and a fetter on the Government’s freedom to act in the political context.

In this political context, the second pertinent issue is whether the human rights situation in Tibet is changing. White Papers issued by the Information Office of the State Council continue to defend China's position in Tibet, showing the sensitivity of the state to external criticism, and yet arguably China is merely 'playing a tactical game designed to deflect Western threats to its regime'.¹⁸² China's position is that human rights in Tibet have improved, and that 'The Central Government and local governments at all levels in the Tibet Autonomous Region have made great efforts to safeguard and promote the progress of human rights in Tibet.'¹⁸³

Some evidence of an improving situation exists. For example: 'In 1987, a provisional law to make Tibetan an official language of the TAR was enacted, including a provision requiring officials there to learn Tibetan. Similar regulations have been promulgated in other PRC Tibetan areas, yet in the main, they have not been implemented. It is not yet clear whether the permanent TAR language law, passed in 2002, will meet with the same disregard.'¹⁸⁴ In addition there is a greater openness now to Tibet, enabling access to those of non-Chinese origin.¹⁸⁵ Invitations such as

¹⁸² Dunne T and Wheeler NJ, 'Introduction: human rights and the fifty years' crisis' in T Dunne and NJ Wheeler (eds) *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999) 1-28, 15.

¹⁸³ Information Office of the State Council of the People's Republic of China, 'New Progress in Human Rights in the Tibet Autonomous Region' White Paper published in Beijing, February 1998, Concluding Remarks, accessible at <<http://www.china.org.cn/e-white/last/index.htm>>. The White Paper considers particularly the ethnic regional autonomy system and the people's political rights, economic development and the people's rights to existence and development, rights to education, culture and health protection, and the right to freedom of religious belief.

¹⁸⁴ He Baogang and Sautman, note 131 above, 627-628, footnotes omitted. In addition some Han officials serving in Tibet are being trained in the Tibetan language. Progress in this respect is therefore evident, although apparently patchy. The 1987 law has to all intents and purposes been withdrawn: Barnett, note 130 above, 45. See, in the context of international obligations, UNGA Resolution 47/135 of 18 December 1992, note 170 above.

¹⁸⁵ For example, in September 1998, Mary Robinson, then UN Human Rights Commissioner, visited China and Tibet at the invitation of the Chinese Government: Ming Wan, note 29 above, 125. However, the Commissioner met with no political prisoners or dissidents. Concerns regarding ongoing human rights abuses at that time were expressed, for instance, by the Tibetan Centre for Human Rights and Democracy, 'Human Rights Update and Archives, 15 September 1998' (1998) <http://www.tchrd.org/publications/hr_updates/1998/hr19980915.html>, accessed 27 June 2006, at 3-4. The same article reported the expulsion of more than 100 monks from Tashi Choeling Monastery in

those issued to the UN Human Rights Commissioner may indicate that the Chinese Government believe there is an improving situation in Tibet.¹⁸⁶ Equally an increasing number of visits will expose Tibetans, and also Han Chinese, to the operation of international human rights organisations.

The People's Republic has found in the recent past that its human rights record can have economic and political costs. For instance, following the 1989 Tiananmen Square incident, both the United States and France agreed to sell military equipment and weaponry to Taiwan, and the issue of Tibet was internationalised further as European Governments met with the Dalai Lama.¹⁸⁷ The return of Taiwan to the motherland is of particular importance to the People's Republic, and it is in such political contexts that pressure can be put on the Chinese Government if the international community has the will.¹⁸⁸

Despite improvements that have taken place in Tibet, some of which may reflect general improvements in economic conditions due to the rapidly expanding Chinese economy, international organisations continue to express concern regarding human rights in Tibet.¹⁸⁹ It is clear that there have been abuses in Tibet, and that China does not fully abide by the rights norms referred to in its own 1982 Constitution, let alone the norms of the international human rights regime. In spite of the supposed universality of human rights such rights are not universally applied. In this respect the

Amdo (at 2). It was noted that the monastery was destroyed during the Cultural Revolution and subsequently renovated in 1980.

¹⁸⁶ For example with regard to rebuilding of monasteries.

¹⁸⁷ Ming Wan, note 29 above, 69.

¹⁸⁸ This will generally has proved to be lacking, and other political interests and factors come into play. For instance, in 1990 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 'did not introduce a resolution on Tibet in exchange for Beijing's agreement not to oppose a resolution on Iraq' in the UN Security Council, where China has a veto: Ming Wan, *ibid*, 113.

¹⁸⁹ For example, Human Rights Watch in its World Report of 2001, see section 5.4.1 above, and recent instances mentioned in note 144 above.

international human rights regime has failed to offer protection to Tibetans, and in that sense the international legal regime fails Tibet.¹⁹⁰

The economic face of the People's Republic is changing, and benefits accruing to the urban centres slowly filter through to the peripheries of the country. Such benefits along with a greater openness should produce human rights benefits. Yet political realities dictate that when human rights issues conflict with state objectives, such as with regard to sovereignty and territorial integrity, sovereignty will prevail.¹⁹¹ Politics plays a key role in determining which of competing international norms may prevail, which of two norms may be accommodating the other. Thus certain aspects of international law may be reinforced, in this case sovereignty. Politics has been pivotal in the international community's reaction to Chinese Tibet, where a human rights regime has been imposed by a dominant Chinese state utilising its own values, although since the end of the Cultural Revolution there has been a more liberal element to the Han Chinese dominance, exemplified by the rebuilding of monasteries.¹⁹²

¹⁹⁰ 'Human rights is a legal device for the protection of smaller numbers of people (the minority or the individual) faced with the power of greater numbers': Pannikar R, 'Is the Notion of Human Rights a Western Concept?' (1982) 120 *Diogenes* 75, quoted in Steiner and Alston, note 1 above, 387. The failure of the human rights regime to protect Tibetans evidences failure of the international legal regime itself, and underlines 'the moral weakness of official commitments to human rights': Santos B de S, *Toward A New Legal Common Sense: Law, Globalization, And Emancipation*, Second Edition (London: Butterworths LexisNexis, 2002) 266.

¹⁹¹ This is of course not only evident in China. This can be illustrated by two separate reports in *The Times* of 26 June 2006 where, first, Mikhail Gorbachev warned Western countries 'to stop interfering in Russia's domestic affairs', saying that '[p]utting pressure on President Putin over human rights . . . would be counter-productive', and secondly, David Cameron, British Conservative Party leader, was to announce plans to replace the Human Rights Act by enshrining a constitutional Bill of Rights 'to rebalance the rights of British citizens after widespread criticism of Human Rights Act rulings': see respectively LeBor A, 'Don't meddle in our affairs, Gorbachev warns the West', 26 June 2006 *The Times* 29 and Charter D, 'We should have a Bill of Rights to stop MPs meddling, say Tories', 26 June 2006 *The Times* 24.

¹⁹² However, the monks and nuns remain subject to Chinese regulation and legal management: see, for example, Bureau of Democracy, Human Rights, and Labor, note 116 above, 42-43, and Tibetan Centre for Human Rights and Democracy, note 146 above, 87ff.

Even though sovereignty as a concept of international law has been reinforced, there are certain limitations on it. A state cannot treat its nationals as it wishes, by virtue of, for example, Article 1(3) of the United Nations Charter. Human rights are part of the mandatory principles of international law binding on member states of the United Nations.¹⁹³ Indeed, the group right of self-determination has been recognised as a part of customary international law with, at minimum, *erga omnes* character.¹⁹⁴ China, however, while accepting the existence of norms of international law and engaging with the international community in respect of human rights matters, does not always comply with those norms, as has been made clear with respect to the human rights of Tibetans, despite its protestations.¹⁹⁵

Having examined in this chapter the links between human rights and self-determination, and examined how the Chinese state has oppressed the lives of Tibetans within the political ambit of the state's human rights regime, it is pertinent to assess whether an expansion of the collective right of self-determination may lead to a reconsideration of the status of Tibet. The political backdrop to this analysis will form a crucial part of the following discussion, as patterns of changing politics and political realism prevail.

¹⁹³ *Kadi*, note 177 above, paras 228, 229.

¹⁹⁴ *Western Sahara Case* Advisory Opinion, ICJ Reports 1975, 12, para. 56; *East Timor (Portugal v Australia)* ICJ Reports 1995, 90, 102; 'In the view of some writers, the principle of self-determination is also *ius cogens*': Harris, note 5 above, 117. See also section 2.4.1 above.

¹⁹⁵ Note, by way of example, the defensive justification of the People's Republic in the 1991 White Paper on 'Human Rights in China': see section 5.3.2 above.

6 Self-Determination and Beyond

6.1 The Twenty-First Century Context

Self-determination played an ever-increasing role during the twentieth century as a weapon in the armoury of those espousing human rights, in particular group human rights. The evolution of the concept has been outlined in Chapter 2 above, and in this chapter the focus will move to the present day and an examination of how the collective right of self-determination has been expanded but also circumscribed, where its dynamics have led it, and how it has been applied. Patterns of a changing political world will form a part of the analysis both as to the status of self-determination in the panoply of international law and the role the theory may perform with reference to the Tibet Question.¹

6.2 A Tempered Idealism

An underlying feature of the theory of self-determination is a determination of the conditions under which a right to external self-determination may be justified.² These conditions have changed over time, just as political theory and views may be perceived to change as contesting ideologies compete for dominance. The history of the theory has evolved during the twentieth century through three distinct phases: first in the aftermath of the First World War with attendant population transfer and

¹ See section 1.2 above with regard to what may be termed 'the Tibet Question'.

² The volume on *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998), edited by Margaret Moore, inter alia 'analyses the various normative theories of secession, which elaborate the conditions in which a right to self-determination, including a right to secession, may be justified': Moore M, 'Introduction: The Self-Determination Principle and the Ethics of Secession' in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 1-13, 1.

exchange; secondly following the Second World War, with the application of the theory to situations of colonial domination; and thirdly in the post-Cold War era.³

In each stage of the theory different conditions in which the right to self-determination may be justified can be elaborated. In the context of the present century the ongoing philosophical debate between the choice theorists and the remedial right theorists gives focus to the elaboration.⁴

6.2.1 Choice Theorists

Choice theorists expound a wider concept, potentially including within the ambit of the theory a large number of peoples entitled to self-determination. The right is essentially conditioned upon choice, the choice expressed by a majority by referendum or plebiscite for self-determination. Daniel Philpott argues for this approach, which harmonises with the approach of ‘John Stuart Mill and Woodrow Wilson, of the American Revolution and colonial independence movements: self-determination is a basic right, rooted in liberal democratic theory, available to any group the majority of whose members desire it’.⁵ Philpott, while propounding this generally permissive approach, constricts the claims by providing that: ‘Self-determining groups are required to be at least as liberal and democratic as the state from which they are separating, to demonstrate a majority preference for self-determination, to protect minority rights, and to meet distributive justice requirements.’⁶

³ Section 2.2 above.

⁴ See also section 2.4.3 above.

⁵ Philpott D, ‘Self-Determination in Practice’ in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 79-102, 80.

⁶ Ibid.

The nature of the group, ‘the peoples’, is at the core of any theory of self-determination, both as to whether particular ‘peoples’ are perceived as being entitled to pursue self-determination, and as to ‘*who* is the majority, *who* is the minority, and what is the relationship between them’.⁷ As to the first part of this issue, the nature of ‘peoples’ has been the subject of debate and uncertainty.⁸ David Miller shows that a principle of nationality supplies a perspective on the issue of secession,⁹ and ultimately a theory of self-determination, as an issue of secession, that ‘can avoid us having to condone a secessionist free-for-all without forcing us to defend existing state boundaries regardless’,¹⁰ and he defines a nation as ‘a group of people who recognize one another as belonging to the same community, who acknowledge special obligations to one another, and who aspire to political autonomy’.¹¹

⁷ Moore, note 2 above, 11, emphasis in original.

⁸ See section 2.3.1 above. See also Tomuschat C, ‘Secession and self-determination’ in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 23-45, 23-26 for a discussion of the concept of people and the attendant dilemma of legal construction.

⁹ Secession is the ultimate potential result of self-determination, although not the only one. It may be defined as ‘the separation of part of the territory of a State carried out by the resident population with the aim of creating a new independent State or acceding to another existing State’: Haverland C, ‘Secession’ in R Bernhardt (ed.), *Encyclopedia of Public International Law* vol. IV (Amsterdam: North Holland, 2000) 354; see also Thio L-A, ‘International law and secession in the Asia and Pacific regions’ in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 297-354, 297. It is only one of the panoply of outcomes that may pertain under the concept of self-determination, but is the one with the most far-reaching consequences, although secession is not of itself a right of self-determination: Nolte G, ‘Secession and external intervention’ in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 65-93, 84. That said, the right of self-determination may be ‘of fundamental importance for either the creation of . . . entities and States or their (continued) survival as States’: Dugard J and Raič D, ‘The role of recognition in the law and practice of secession’ in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 94-137, 120. Secession and external self-determination may be contrasted with internal self-determination: see sections 2.2 and 2.4.2.4 above. Especially in the Tibetan context, it may be noted that ‘Ethnic and religious conflicts fuel contemporary secessionist struggles by groups possessing distinct identities . . . [yet the fact of diverse populations within states] does not necessarily lead to secessionist claims; there are instances where groups restrict their claims to greater autonomy and political participation rights’: Thio, *ibid*, 312.

¹⁰ Miller D, ‘Secession and the Principle of Nationality’ in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 62-78, 75. The potential secessionist free-for-all in a world where the majority of states are heterogeneous is referred to by Tomuschat, note 8 above, 24.

¹¹ Miller, *ibid*, 65.

It is instructive to apply these elements of a choice theory of self-determination to Tibet. First, as to the question of nationhood, there are arguments that prior to 1950 China and Tibet were two separate sovereign independent states,¹² and indeed both Chinese Republican and Chinese Communist thinking was that China ‘was composed of five nationalities: Han, Manchu, Mongolian, Hui (Chinese Muslim), and Tibetan’.¹³ Whether recognised as a nation or as a nationality Tibetans can claim to be ‘a group of people who recognize one another as belonging to the same community’, and this an ethnic community. Further, Tibetans are inextricably bound together by their religion and their culture, thus they ‘acknowledge special obligations to one another’. The element of aspiration to political autonomy is more complex, and this links particularly to the conditioning of the right to self-determination upon choice.

Two specific problems materialise in the Tibetan context: first, that of who is to exercise choice; and, second, how any such choice is to be evidenced, let alone acted upon. The difficulty regarding the ‘who’ is problematic, first because all Tibetans are not resident in Tibet. In addition, the point raises questions as to the extent of Tibet. Certainly any independent Tibet would include the Tibet Autonomous Region (TAR), but Tibetans would premise that it should also include the provinces of Kham and Amdo, where a significant number of Tibetans reside – regions that historically have formed part of ethnographic Tibet.¹⁴ Therefore, so far as the ‘who’ is concerned, the ‘who’ may include Tibetans in Kham and Amdo, but there are also Tibetans in exile – and a Tibetan government in exile.¹⁵ Arguments by proponents of Tibetan self-determination would thus focus on all ethnic Tibetans being entitled to have their say,

¹² See, for example, sections 3.2.1 and 3.3.4 above.

¹³ Wu H, ‘My View on the Tibet Issue’ in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 91-96, 92.

¹⁴ See Chapter 3 above, note 99.

¹⁵ See especially section 4.4.2.3 above.

yet a proportion of these live outside the TAR, and indeed outside the greater area of ethnographic Tibet. This leads on to a second problem regarding the ‘who’: should those exercising choice include the Han population of Tibet?¹⁶ Cao Changching argues that on the issue of Tibet any reference to choice ‘has to mean respecting the majority of the *Tibetan* people’s will’.¹⁷ Yet if choice is exercised by Tibetans in and outside Tibet such a choice is one that would not be recognised in any sense by any government of China. This directly brings up the second difficulty referred to – as to how any such choice regarding Tibetan self-determination is to be evidenced.

Philpott premises his arguments on the basis of exercise of choice through referendum or plebiscite. The political realities in the People’s Republic of China are such that no such referendum or plebiscite would be permitted in the current climate. This then may lead us to reject the application of the choice theory of self-determination both generally and also specifically with regard to the Tibet Question. First, because there are problems with the theory itself: its inevitable and logical result is fragmentation of states, leading to, among other problems, an ever-increasing number of states.¹⁸

¹⁶ In a 1959 referendum by virtue of which Hawaii voted to become a state of the USA, ‘no distinction was drawn between “native” Hawaiians from the majority “colonial” population and non-“native” Hawaiians’ – this is one point by virtue of which indigenous people of Hawaii assert ‘the violation of their right to self-determination through the US’ invalid annexation of the Hawaiian Kingdom’: Thio, note 9 above, 316-317. See also Palley C, *An International Relations Debacle: The UN Secretary-General’s Mission of Good Offices in Cyprus 1999-2004* (Oxford and Portland, Oregon: Hart Publishing, 2005) 74, regarding the issue surrounding Turkish settlers participating in the referendum vote on a new settlement and Constitution for Cyprus on 30 April 2004: although the Turkish Cypriot community voted in favour of the referendum plan, the plan was rejected in any event by the Greek Cypriots. Cyprus as a whole acceded to the EU on 1 May 2004, but by Protocol 10 of the EU Treaty of Accession 2003 the *acquis* was suspended in the northern, Turkish part of the island, over the area of which the Government of Cyprus does not exercise effective control: <http://ec.europa.eu/enlargement/turkish_cypriot_community/index_en.htm>, accessed 14 September 2007. See also Katsigeorgis J, ‘Cyprus Post-referendum’ (2004) <http://www.un.org/Pubs/chronicle/2004/webArticles/073004_Cyprus.asp>, accessed 23 April 2007.

¹⁷ Cao Changching, ‘Independence: The Tibetan People’s Right’ in Cao Changching and JD Seymour (eds), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination* (Armonk, New York, and London: ME Sharpe, 1998) 3-23, 18, emphasis in original.

¹⁸ See section 2.4.3 above. The Bangkok Governmental Declaration of 1993 (see section 5.2.2 above), by virtue of stressing territorial integrity and a state’s right to political independence, contemplates self-determination in a restrictive fashion, which ‘pre-empts groups within sovereign independent States

Secondly, because, taking into account the dominant position of the People's Republic of China, it is difficult to see how choice theory could rationally assist any resolution of the question. A referendum to evidence choice would not be sanctioned by the People's Republic, neither on a question of secession nor on one of internal self-determination, a concept that is seen as being of particular relevance to choice theorists.¹⁹

6.2.2 Remedial Right Theorists

Remedial right theorists emphasise that the right to self-determination is legitimated only if the right is necessary to remedy a prior injustice.²⁰ Thus a people exercising a simple choice by referendum or plebiscite will not, should not, ground a collective right to self-determination: indeed Allen Buchanan argues that 'recognition of a plebiscitary right to secede would threaten democracy'.²¹ Consequently the remedial right theorists impose a burden of proof on those seeking self-determination, a burden to prove they have a just cause:

[A] group has the right to secede (in the absence of any negotiations or constitutional provisions that establish a right) only as a remedy of last resort to escape serious injustices. On my version of the remedial right only position, injustices capable of generating a right to secede consist of persistent violations of human rights, including the right to participate in democratic governance, and the unjust taking of the territory in question, if that territory

from asserting self-determination as grounds for a legal claim to secession, allaying fears of State fragmentation': Thio, note 9 above, 310.

¹⁹ Philpott, note 5 above, 86. See section 6.3.3 below on the future status of Kosovo as to the possibility of secession without the consent of the predecessor state.

²⁰ See section 2.4.3 above.

²¹ Buchanan A, 'Democracy and Secession' in M Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 14-33, 17.

previously was a legitimate state or a portion of one (in which case secession is simply the taking back of what was unjustly taken).²²

This view of remedial rights and self-determination has considerable potential significance for the Tibetan situation.²³ Christian Tomuschat argues that remedial secession ‘has broad support in the legal literature’ and ‘should be acknowledged as part and parcel of positive law’.²⁴ He acknowledges that the empirical basis is thin, but points out that it is not entirely lacking: ‘the events leading up to the establishment of Bangladesh and the events giving rise to Kosovo as an autonomous entity under international administration can both be classified as coming within the purview of remedial secession’.²⁵ It should be noted, however, that Buchanan talks of secession as a last resort. This is right, for if issues can be dealt with in less conflictual ways the not inconsiderable disadvantages surrounding secession may be avoided: disadvantages that include attendant increases in new minorities; the potential increased movements of peoples seeking escape from or entry to a state; increased

²² Ibid 25. Further, ‘The international community is more likely to recognise the realities of secessionist attempts as a remedy where the government of the predecessor State committed gross human rights violations against the seceding unit’: Thio, note 9 above, 300. Buchanan refers to a group having the right to secede, and the nature of a ‘group’ having the right to benefit from the principle of self-determination can be distilled into two particular questions: first, as to who the people are; and secondly, as to the relevant territorial unit over which they should exercise self-determination. These questions are interrelated: Moore, note 2 above, 2. See section 6.2.1 above, for example, as to the issue of ‘people’ in the Tibetan context, and especially section 6.5 below as to the question of ‘territorial unit’. Issues of whether a seceding unit can meet the criteria for statehood laid down by Article 1 of the 1933 Montevideo Convention on Rights and Duties of States (165 LNTS 19) will also be of relevance. See section 4.2.1 above regarding criteria for statehood, and see section 4.5 above regarding the potential of Tibet to satisfy those criteria. It is also of note that states may arise before all elements of the criteria are in place: see, for example, sections 4.2.1.3 and 4.5.1 above. In the instance of Bangladesh, ‘What brought about the recognition of the new entity by the international community was simply the principle of effectiveness’: Tomuschat, note 8 above, 30.

²³ It is also a view of remedial rights and self-determination taken by Christian Tomuschat, who writes of ‘the idea that exceptional circumstances are capable of sustaining a claim for secession – circumstances which may roughly be summarized as a grave and massive violation of the human rights of a specific group in a discriminatory fashion’: Tomuschat, *ibid*, 35. A line, in addition, taken by Lee Buchheit, termed ‘remedial secession’: see Buchheit L, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) 222.

²⁴ Tomuschat, *ibid*, 38, 42.

²⁵ Ibid 42; see sections 6.3.2, 6.3.3 and 7.2 below concerning ongoing developments with regard to Kosovo, also the latter with reference to relevant issues of customary international law. For a contrary view of Bangladesh, see note 54 below.

fluidity of political and legal identity; and of course potential armed conflict.²⁶ Thus when considering the application of the remedial right theory two specific issues arise: first, whether injustices capable of generating a right to secede exist; secondly, whether the injustices can be resolved without resorting to the ultimate sanction of secession.

So far as the Tibet Question is concerned, therefore, it can be asked whether there have been injustices capable of generating a right on behalf of Tibetans to secede. These injustices may consist of persistent violations of human rights. In Chapter 5,²⁷ I examined the topic of oppression in Tibet, and found that an ongoing pattern of human rights abuse is evident in Tibet in the sphere of civil and political rights²⁸ and that, although the International Covenant on Economic, Social and Cultural Rights has been ratified by China, it has apparently not been complied with.²⁹ Consequently a case can be mounted that there are persistent violations of Tibetan human rights such as to found injustices capable of generating a right for Tibet to secede from the People's Republic of China. Tibetans may further try to found such arguments on the 'unjust taking of territory'.³⁰ However, the issue of whether Tibetan territory has been

²⁶ See section 2.4.3 above; and also note armed conflict in respect of the break-up of the former Yugoslavia: see section 2.4.2.2 above and section 6.3.2 below. The creation of new states 'disrupts the composition of international society and challenges the very foundations of its main actors': Kohen MG, 'Introduction' in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 1-20, 1. However, 'The violation of the right to internal self-determination, including the violation of minority and political participation rights, is a precursor to claims to external self-determination through secession': Thio, note 9 above, 321.

²⁷ At section 5.4 above.

²⁸ Section 5.4.1 above.

²⁹ The ICESCR was adopted on 16 December 1966 and entered into force 3 January 1976: 999 UNTS 3. See section 5.2.1 above regarding ratification of the 1966 International Covenants by China, and section 5.4.2 above regarding oppression in Tibet and economic, social and cultural rights.

³⁰ The claims of Lithuania, Estonia and Latvia, the Baltic Republics, for independence in the early 1990s were based on claims of forcible and illegal annexation by the Soviet Union in 1940; their claims 'were not articulated as an exercise of the right to self-determination or as a secession, but rather as a reassertion of the independence and *de jure* continuity of these States which had been sovereign from 1918 to 1940': Pazartzis P, 'Secession and international law: the European dimension' in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 355-373, 363. It is nevertheless the case that 'No territorial acquisition resulting from the threat or use of force shall be recognized as legal': UNGA Resolution 2625 (XXV) The Declaration on Principles of

taken by China is highly contentious. Moreover Tibetan arguments in this respect have not found favour with the international community.³¹ Alternatively Tibetans may argue that their participation in democratic governance within the People's Republic is illusory due to Han dominance within the state; yet they do have rights to participate and have the protection of the Chinese Constitution.³² All in all, the overriding issue from the Tibetan perspective to establish a just cause, and to fall within the ambit of the remedial right theory, is that of persistent violation of human rights.

Having established that this is the overriding issue for Tibetans so far as the remedial right theory is concerned, and as I have previously argued that the international legal order has failed Tibet,³³ in the light of what has been said in this section I will consider the dynamism of the theory of self-determination and whether this has the potential to unlock the Tibet Question, to assist ethnic Tibetans.

6.3 The Dynamic Theory of Self-Determination: A New Progression

According to traditional theory, 'the function or disappearance of a State is a pure fact, a political matter, remaining outside the realm of law (which does not create States but presupposes their existence as *de facto* sovereign entities)'.³⁴ However, this

International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, extract from the first principle therein, and this principle that belligerent occupation does not affect a state's continuity is well established: Crawford J, *The Creation of States in International Law*, Second Edition (Oxford: Clarendon Press, 2006) 688. See also Chapter 3, note 76 above.

³¹ The response of the international community with regard to the predicament of Tibet has been limited: subsequent to the events of 1950, to the flight of the Dalai Lama to India in 1959, and indeed thereafter. See sections 3.3 and 3.4.3 above.

³² See section 5.3.1 above for a discussion of the current Chinese Constitution, adopted on 4 December 1982, and various relevant provisions thereof.

³³ Section 5.5 above.

³⁴ Tancredi A, 'A normative "due process" in the creation of States through secession' in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 171-207, 171-172. See also sections 6.3.3 and 7.2 regarding creation of states, state building from the outside, especially with reference to Kosovo. If, however, a state comes into existence or ceases to

norm has been abrogated within the framework of self-determination emanating from decolonisation, and the question now is how far this exception has expanded in the post-Cold War period, when few colonised territories remain under the control of the metropolitan state. An attempt to answer this question ‘may be based on the practice of the last decade, a period which hosted a large number of processes of State creation’.³⁵ It is in this context that the remedial right theory is pertinent. As a preliminary to issues of dynamism, however, when considering the conditions in which a right to self-determination may be justified, it always has to be borne in mind that in international law there is no right to unilateral secession, thus secession, subject to exceptions referred to in section 6.3.1 below, is not a right of self-determination.³⁶

6.3.1 *Secession*

Secession as a concept is in opposition to ideas of territorial integrity and state sovereignty. It is these latter ideas that dominate the international political arena, and by extension international law. The Charter of the United Nations emphasises the inviolability of territorial integrity and the political independence of the state,³⁷ as for example do UNGA Resolution 1514 (XV) of 14 December 1960³⁸ and UNGA

exist, this de facto situation should be based on principles of international law: see, for example, para. 1(a) of Opinion No. 1 of the Arbitration Commission of the Conference for Peace in Yugoslavia (1992) 31 *International Legal Materials* 1494-1497 (the Badinter Commission).

³⁵ See Tancredi, *ibid*, 184.

³⁶ See note 9 above. As Antonelli Tancredi concludes, ‘international law, as it now stands, recognises neither a general nor a remedial right to secede in oppressive contexts’: Tancredi, *ibid*, 188; although a state formed in breach of ‘due process . . . is not inexistent from a factual or a legal point of view’: *ibid* 205. Further, however, ‘The right to self-determination of subaltern nations is really a right to secession from the control of dominant powers’: Hardt M and Negri A, *Empire* (Cambridge, MA: Harvard University Press, 2001) 106, echoing back to the views of Lenin who affirmed a right to national self-determination, which was ‘really the right to secession for all’: *ibid* 432, note 7.

³⁷ Article 2(4) of the Charter, recalled in para. 87 of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, ICJ, 9 July 2004; (2004) 43 *International Legal Materials* 1009.

³⁸ The Declaration on the granting of independence to colonial countries and peoples: see Chapter 2, note 28 above.

Resolution 2625 (XXV) of 24 October 1970,³⁹ and an entity is only able to separate itself from its parent state in limited circumstances.⁴⁰

It is clear therefore that, subject to certain exceptions, unilateral secession is not recognised in international law, and ‘Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations’.⁴¹ State practice therefore resists any claim to a right to secession, ‘leading to statehood against the will of the present sovereign’.⁴² Thus the primacy of territorial integrity is acknowledged. There remain, however, exceptions to the inviolability of territorial integrity, and these become evident in the historical context of self-determination.

A principal exception relates to the recovery of land lost to enemy action, and ‘existing states which have been invaded or which are otherwise clearly controlled by foreign powers have a right of self-determination, i.e., the right to overthrow the invaders and re-establish independence’.⁴³ This exception has particular application in the colonial context, but is said not to apply to a minority within a subsisting state, and indeed, so far as such minorities are concerned, ‘constant state practice and the weight of authority require the conclusion that such a right does not exist’.⁴⁴ If though

³⁹ See note 30 above. Also see Chapter 2, note 53 above.

⁴⁰ See exceptions mentioned below, and also Chapter 2, note 53 above.

⁴¹ UNGA Resolution 1514 (XV) of 14 December 1960, note 38 above, point 6.

⁴² Warbrick C, ‘States and Recognition in International Law’ in MD Evans, *International Law*, Second Edition (Oxford: Oxford University Press, 2006) 217-275, 227; consequently there is no right in international law to unilateral secession ‘where the central government represented “the people as a whole on the basis of equity and without discrimination”’: *ibid*, referring to *Reference re Secession of Quebec* [1998] 25 SCR 217, para. 154, where the wording in fact is ‘the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination’.

⁴³ Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition (Philadelphia: University of Pennsylvania Press, 1996) 48; see also section 6.2.2 above.

⁴⁴ *Ibid* 49. See also Crawford, note 30 above, 415. The application of the principle of *uti possidetis* applies. See Chapter 2, note 28 above. Also note that, although republics were able to secede from the Soviet Union, federal units were not given the opportunity to establish statehood, for example

an independent state is unlawfully invaded and annexed, international law protects that state so that it may, ‘even for a considerable time, continue to exist as a legal entity despite lack of effectiveness’.⁴⁵ Thus, so far as Tibet is concerned, this particular exception can only have any relevance if it can be established that Tibet was an existing state prior to 1950. Arguments can be put forward that Tibet was *de facto* independent at that time, but *de jure* sovereignty has not been established.⁴⁶ As discussed, this essentially resulted in Tibet not being recognised as a state, and it is this lack of recognition that has proved critical and so far determinative as the international community has to all intents and purposes taken the side of China, recognising Tibet as a territory within that state.⁴⁷

States in the post-World War II era have shown ‘extreme reluctance . . . to recognize or accept unilateral secession outside the colonial context’.⁴⁸ However, a second exception is apparent in that ‘A government may become partially illegitimate if effective participation by minority or indigenous groups or their members has been rendered impossible by either deliberate discrimination or a political situation which permanently excludes such groups’.⁴⁹ Similarly a government may lose legitimacy if it practises human rights abuses: and the ‘common denominator is the violation of fundamental rights by the state’.⁵⁰ The United Nations Charter, in its Purposes and Principles, refers to promoting and encouraging respect for human rights,⁵¹ and, due to the increasing profile and significance of human rights, if a state fails to respect the

Chechnya: Warbrick, note 42 above, 227. However, by way of potential contrast, see the instance of Kosovo: section 6.3.3 below.

⁴⁵ Crawford, *ibid*, 63. See also section 4.2.1.4 above.

⁴⁶ See section 3.2.1 above, and also Chapter 3, notes 50 and 133 above.

⁴⁷ While of course strictly speaking recognition is not a criterion of statehood; see Chapter 4, note 17 above. See Chapter 4 generally regarding issues of sovereignty and Tibet.

⁴⁸ Crawford, note 30 above, 415.

⁴⁹ Hannum, note 43 above, 470-471.

⁵⁰ *Ibid* 471. See also section 6.3.3 below.

⁵¹ Article 1(3).

human rights of its peoples or minorities it may ‘forfeit the protection it enjoys by virtue of international law’.⁵² This may lead to intervention by the international community, and while such government practices may not legitimate a right to secession they may legitimate a basic right to resistance, to self-help, on the part of the community discriminated against, by oppressed peoples, and such right may lead to a recognised effective secession.⁵³ Other than the instance of Bangladesh it is arguable that, in the decades following 1945, of the newly emergent states outside the colonial context, none achieved independence through unilateral secession.⁵⁴ Yet, the dynamism of the theory of self-determination may be evidenced by more recent events where there has been intervention by the international community, particularly in Kosovo.

6.3.2 Kosovo and Intervention by the International Community

States within the international community, and bodies within the United Nations, have in recent years shown an increasing appetite for intervention against the territorial integrity of Member States.⁵⁵ Thus territorial integrity diminishes in importance for

⁵² Tomuschat, note 8 above, 41.

⁵³ ‘In the end, one is left with the thought that remedial secession . . . merely affirms a basic right of revolution by oppressed peoples; and that has long been thought to be one of those “inalienable” rights which the international community could neither bestow nor revoke’: Buchheit, note 23 above, 223. This contention receives strong support, by implication, from the penultimate paragraph, under the heading ‘The principle of equal rights and self-determination of peoples’, in UNGA Resolution 2625 (XXV), note 30 above: ‘Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.’

⁵⁴ Even in the case of Bangladesh, ‘The indications are that the United Nations did not treat the emergence of Bangladesh as a case of self-determination despite good grounds for doing so, but rather as a *fait accompli* achieved as a result of foreign military assistance in special circumstances. The violence and repression engaged in by the Pakistan military made reunification unthinkable, and in effect legitimised the creation of the new State’: Crawford, note 30 above, 415-416. Others, though, believe the establishment of Bangladesh does come within the principle of self-determination: see note 25 above and related text.

⁵⁵ ‘What is “international,” and the concern of the international community, and what is “domestic,” and the sole concern of a nation, are evolving concepts’: Plunk RL, *The Wandering Peacemaker*

those looking on and then intervening. One area stands out as of special importance in this respect: the Balkans generally, Kosovo in particular.

Reference has previously been made to the break-up of the former Yugoslavia,⁵⁶ and especially to the intervention of the United Nations by reference to UN Security Council Resolution 1244 (1999).⁵⁷ Kosovo was a self-administering province of Serbia under the 1974 Yugoslav Constitution,⁵⁸ but self-rule ‘was curtailed in 1989 leading to local unrest’,⁵⁹ and further curtailed the following year by a new republican constitution proclaimed by Serbia on 28 September 1990.⁶⁰ The goal of the Kosovars was independence from Serbia ‘under international (presumably UN) protection’,⁶¹ and in response to the 1989 curtailment of autonomy the Kosovo provincial assembly on 2 July 1990 issued a Declaration of Independence, which made reference to the sovereign right, including the right to self-determination, of the Kosovar people.⁶² Kosovo attempted to secede from Serbia, if not from Yugoslavia, at that time, and a plebiscite was held in September 1991 on Kosovo’s sovereignty and independence. Following secession from Yugoslavia by Croatia and Slovenia the next month, Kosovo declared independence and sought international recognition. Only one state,

(Charlottesville, VA: Hampton Roads Publishing Company, Inc., 2000) 119. In addition, *realpolitik* itself turns the focus on the respective roles of international law and politics – ‘Normative weakness of International Law and predominance of “real politic” in it, turn International Law into “embryonic law” in fact’: Savaneli B, ‘Necesity [sic] of Transformation of International Law Into Universal Human Rights Law in the Framework of Pure Theory of Law After September 11’

Accessible at <http://www.iatp.org.ge/downloads/publications/savaneli_transform.pdf>.

⁵⁶ Section 2.4.2.2.

⁵⁷ Adopted by the Security Council at its 4011th meeting on 10 June 1999.

⁵⁸ The Constitution of the Socialist Federal Republic of Yugoslavia, promulgated on 21 February 1974, and reprinted in part in Trifunovska S, *Yugoslavia Through Documents: From its creation to its dissolution* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1994) 224-233. The Socialist Federal Republic of Yugoslavia was a federal state comprising five Socialist Republics and also two ‘Socialist Autonomous Provinces of Vojvodina and Kosovo, which are constituent parts of the Socialist Republic of Serbia’: Article 1 of the 1974 Constitution; see also Article 2.

⁵⁹ Crawford, note 30 above, 557. See also Radan P, *The Break-up of Yugoslavia and International Law* (London and New York: Routledge, 2002) 196-197.

⁶⁰ By Article 6 of that constitution, Kosovo, renamed ‘the Autonomous Province of Kosovo and Metohija, was stated to have a “form of territorial autonomy”’: Radan, note 59 above, 197.

⁶¹ Glenny M, *The Fall of Yugoslavia: The Third Balkan War* (London: Penguin Books, 1992) 181.

⁶² Radan, note 59 above, 198.

Albania, recognised Kosovo's independence, and it is noteworthy that the European Community was not prepared to grant recognition of autonomous provinces, only of republics of the former Yugoslavia.⁶³

The Kosovo Liberation Army formed and started to attack federal security forces of the rump Yugoslavia in 1997, and following continued and spreading violence on both sides UN Security Council Resolution 1160 (1998) expressed 'its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration'.⁶⁴ At subsequent talks in early 1999 at Rambouillet, the Federal Republic of Yugoslavia (FRY) 'rejected provisions for NATO peacekeeping and eventually withdrew from the talks'.⁶⁵ There followed a NATO bombing campaign, commencing on 24 March 1999, days before the NATO-led KFOR (Kosovo Force) was deployed under UN Security Council Resolution 1244 (1999) and FRY forces withdrew from Kosovo. Resolution 1244 (1999) confirmed the territorial integrity of the FRY, yet brought about what was effectively a partitioning of Kosovo from the FRY under the protection of the United Nations by virtue of the deployment of KFOR.⁶⁶

Thus both NATO and, as a mandating authority, the United Nations have shown willingness to intervene here in the affairs of a sovereign state, despite references in Security Council resolutions to commitment to the sovereignty and territorial integrity

⁶³ Ibid 199-200, referring to the Arbitration Commission of the Conference for Peace in Yugoslavia (the Badinter Commission); and see also Arbitration Commission of the Conference for Peace in Yugoslavia, Opinion No. 2 (1992) 31 *International Legal Materials* 1497-1499, confirming the applicability of the principle of *uti possidetis* in the context of whether the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent people of Yugoslavia, had a right to self-determination.

⁶⁴ Paragraph 5 of UNSC Resolution 1160 (1998), adopted by the Security Council at its 3868th meeting on 31 March 1998.

⁶⁵ Crawford, note 30 above, 557. See also note 74 below and related text.

⁶⁶ Radan, note 59 above, 201. Resolution 1244 (1999), at para. 3, had demanded that the FRY put an end to violence and repression in Kosovo and also that the FRY conduct a phased withdrawal of its military, police and paramilitary forces from Kosovo. See section 2.4.2.2 above with regard to the development of KFOR.

of the states in the region, including the FRY.⁶⁷ Yet it was concern for humanitarian matters that prevailed in the United Nations, and UN Security Council Resolution 1244 (1999), in its preamble, underlined a determination ‘to resolve the grave humanitarian situation in Kosovo’, referring also to a ‘humanitarian tragedy’, while UN Security Council Resolution 1160 (1998), referred to in Security Council Resolution 1244 (1999), emphasised ‘that the way to defeat violence and terrorism in Kosovo is for the authorities in Belgrade to offer the Kosovar Albanian community a genuine political process’.⁶⁸ This concern chimes with the approach of the Badinter Commission which, in its Opinion No. 2, stated that ‘Article 1 of the two 1966 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights’, and the Commission considered that ‘international law as it currently stands does not spell out all the implications of the right to self-determination’.⁶⁹

In consequence, in 2003 Michael Ignatieff felt able to comment that although ‘Kosovo’s future is held in the balance so that appearances of the international state order can be maintained. . . . Kosovo does set a precedent. It establishes the principle that states can lose sovereignty over a portion of their territory if they so oppress the majority population that they rise in revolt and successfully enlist international

⁶⁷ See, for example, the preamble to UNSC Resolution 1244 (1999); also the preamble to UNSC Resolution 1239 (1999), adopted by the Security Council at its 4003rd meeting on 14 May 1999.

⁶⁸ Paragraph 3 of UNSC Resolution 1160 (1998). It is also of note that two international tribunals, the ICTY and the ICTR, have in recent years been established to deal with grave violations of human rights. The ICTY was set up in 1993: see section 2.4.2.2 above. The ICTR was established in 1994 ‘for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994’: see website of the International Criminal Tribunal for Rwanda, ‘About the Tribunal – General Information’, <<http://69.94.11.53/default.htm>>. These tribunals strengthen the force of human rights law, and evidence increased forces against national sovereignty, although the tribunals themselves do not put at risk the territorial integrity of the state.

⁶⁹ Opinion No. 2, note 63 above, paras 1 and 3.

support for their rebellion.’⁷⁰ The legitimacy of the United Nation’s action in Kosovo has been questioned,⁷¹ yet the fact of the matter is that it shows a will on the part of the international community to proactively intervene in the internal affairs of a nation state, both in Security Council resolutions and on the ground.⁷² It is also instructive that this intervention followed violence by an ethnic ‘liberation army’.

6.3.3 *The Future Status of Kosovo*

The ultimate outcome for Kosovo is not yet certain, but the latest developments are of significance for the concepts of sovereignty and self-determination. On 2 February 2007 Martti Ahtisaari, the UN mediator in Kosovo, revealed his draft proposals for the future status of Kosovo.⁷³ This process had been launched in accordance with Security Council Resolution 1244 (1999), which mandates the international presence to promote substantial autonomy in Kosovo, taking into account the Interim Agreement for Peace and Self-Government in Kosovo (the so-called Rambouillet Accords).⁷⁴ Martti Ahtisaari, former President of Finland, was appointed by the Secretary-General of the United Nations as his Special Envoy for the future status of Kosovo in October 2005, an appointment supported by the UN Security Council the

⁷⁰ Ignatieff M, *Empire Lite: Nation-building in Bosnia, Kosovo and Afghanistan* (London: Vintage, 2003) 69-70.

⁷¹ See Crawford, note 30 above, 560.

⁷² The partitioning of Kosovo from the FRY is also *ipso facto* in defiance of the principle of *uti possidetis* in that it partitions a state (Serbia) that has itself been formed through the self-determination of the constituent parts of the Socialist Federal Republic of Yugoslavia.

⁷³ UNOSEK Press Release, 2 February 2007, ‘Special Envoy Martti Ahtisaari presents his proposal for the future status of Kosovo in Belgrade and Pristina’, Press Release available at <<http://www.unosek.org/unosek/en/press.html>>. These draft proposals are superseded by the draft Comprehensive Proposal for the Kosovo Status Settlement: see below. UNOSEK is the United Nations Office of the Special Envoy for Kosovo.

⁷⁴ Paragraph 11(a) and (e) of UNSC Resolution 1244 (1999). The Interim Agreement for Peace and Self-Government in Kosovo, dated 23 February 1999 at Rambouillet, France, provided framework and detail for peace and self-government in Kosovo, including inter alia detailed provisions for a constitution, policing and security, elections, and humanitarian assistance, reconstruction and economic development. The agreement can be accessed at <<http://jurist.law.pitt.edu/ramb.htm>>, for example, and the Accords are annexed to UN DOC S/1999/648. Yugoslavia refused to sign the Agreement: Radan, note 59 above, 200. See also note 65 above and related text.

following month.⁷⁵ In addition, ten Guiding Principles were issued by the Contact Group for a settlement of the status of Kosovo,⁷⁶ which included provision, inter alia, that:

- ‘The settlement of the Kosovo issue should be fully compatible with international standards of human rights, democracy and international law’;⁷⁷
- ‘The settlement should ensure multi-ethnicity that is sustainable in Kosovo’;
- ‘The settlement of Kosovo’s status should include specific safeguards for the protection of the cultural and religious heritage in Kosovo’; and
- ‘For some time Kosovo will continue to need an international civilian and military presence to exercise appropriate supervision of compliance of the provisions of the Status settlement, to ensure security and, in particular, protection for minorities as well as to monitor and support the authorities in the continued implementation of standards’.⁷⁸

Subsequent to the presentation of the draft Comprehensive Proposal for the Kosovo Status Settlement of February 2007, a series of meetings on the proposal then took

⁷⁵ See Background on the Origins of UNOSEK, accessible through <http://www.unosek.org/unosek/index.html>.

⁷⁶ The Contact Group, comprising France, Germany, Italy, Russian Federation, United Kingdom and United States, is an advisory group – ‘an important link between Kosovo and the UN Security Council’: Dickinson M, ‘The Contact Group and Kosovo’s Way Forward’ (2005) <http://www.unmikonline.org/pub/focuskos/feb05/focuslead2.htm>, accessed 7 June 2007. It was created in 1998 and has been involved since inception in the resolution of the question of Kosovo’s status: see, for example, Letter Dated 9 July 1998 from the Acting Permanent Representative of Germany to the United Nations Addressed to the Secretary-General, UN DOC S/1998/657, 16 July 1998, accessible at <http://www.un.org/peace/kosovo/s98657.pdf>; also see Background on the Origins of UNOSEK, note 75 above. The work of the Contact Group has the approval of the United Nations: see, for example, UNSC Resolutions 1160 (1998) and also 1199 (1998) adopted by the Security Council at its 3930th meeting on 23 September 1998.

⁷⁷ As to whether the proposed settlement does comply with international law, see section 7.2 below with regard to customary rules of international law.

⁷⁸ Guiding Principles of the Contact Group for a settlement of the status of Kosovo, accessible through <http://www.unosek.org/unosek/index.html>.

place involving the Special Envoy, representatives of both parties, and also representatives of the Contact Group, the European Union and NATO.⁷⁹ The Special Envoy was left ‘with no doubt that the parties’ respective positions on Kosovo’s status did not contain any common ground to achieve an agreement’ and thus he ‘concluded that the potential of negotiations was exhausted’.⁸⁰ On 14 March 2007 the Final Comprehensive Proposal for a Kosovo Status Settlement prepared by the Special Envoy was handed over to the Secretary-General of the United Nations, together with the Report of the Special Envoy on Kosovo’s Future Status.⁸¹

The Report of Martti Ahtisaari on Kosovo’s future status is unequivocal: ‘I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.’⁸² The Special Envoy refers to the systematic discrimination against the Albanian majority in Kosovo, the response of the Kosovo Albanians in the form of armed resistance, and the subsequent ‘reinforced and brutal repression’ by Belgrade during the 1990s.⁸³ Martti Ahtisaari therefore states: ‘A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its

⁷⁹ ‘The Status Process (updated 1st August [2007])’, accessible at <http://www.unosek.org/docref/The%20Status%20Process-0108doc>.

⁸⁰ Ibid.

⁸¹ Ibid. See also Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, with Report of the Special Envoy of the Secretary-General on Kosovo’s future status annexed, S/2007/168; and Addendum comprising the Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1. In his letter, the Secretary-General stated that he fully supported both the recommendation of Martti Ahtisaari in his Report and the Comprehensive Proposal. The terms of reference acted upon by the Special Envoy were that the process ‘should culminate in a political settlement that determines the future status of Kosovo’, and his mandate explicitly provided that he ‘determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground’: paras 1 and 3 of the Report of the Special Envoy. It will be for the UN Security Council to consider the Report and Comprehensive Proposal. See section 7.2 below regarding legitimization of the proposals.

⁸² Report of the Special Envoy, *ibid*, para. 5. In the same paragraph, Martti Ahtisaari comments that his Comprehensive Proposal for the Kosovo Status Settlement ‘provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence’.

⁸³ Ibid, para. 6.

authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia – however notional such autonomy may be – is simply not tenable.’⁸⁴ He also concludes the ‘international administration of Kosovo cannot continue’,⁸⁵ thus that ‘Independence is the only option for a politically stable and economically viable Kosovo’.⁸⁶

The Settlement provides that ‘Kosovo shall be a multi-ethnic society, which shall govern itself democratically, and with full respect for the rule of law’.⁸⁷ The exercise of public authority ‘shall be based upon the equality of all citizens and respect the highest level of internationally recognized human rights and fundamental freedoms’.⁸⁸ A Constitution is to be adopted to enshrine such principles and to promote ‘the peaceful and prosperous existence of all its [Kosovo’s] inhabitants’.⁸⁹ The general principles stipulated in the Comprehensive Status Settlement include clear elements of sovereignty, for example:

- ‘Kosovo shall have the right to negotiate and conclude international agreements and the right to seek membership in international organizations’;⁹⁰
- ‘Kosovo shall have its own, distinct, national symbols, including flag, seal and anthem’;⁹¹

⁸⁴ Ibid, para. 7. Such comments may also have resonance with regard to, for instance, Chechnya within the borders of Russia.

⁸⁵ Ibid, para. 8.

⁸⁶ Ibid, para. 10.

⁸⁷ Article 1.1 of the Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1: note 81 above. This reference to democracy is despite the fact that all states have the right to choose their own political system. The UN Charter imposes no duty so far as democracy is concerned: see Articles 2(7) and 4(1) of the Charter. See also Simpson G, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2005) 264-269, regarding the rejection of a proposed requirement of the UN that states should have democratic institutions; questions of democracy, therefore, are within the domestic jurisdiction of a state.

⁸⁸ Comprehensive Proposal for the Kosovo Status Settlement, *ibid*, Article 1.2.

⁸⁹ Ibid, Article 1.3; see also Annex 1, Article 1.

⁹⁰ Ibid, Article 1.5.

- ‘Kosovo shall take all necessary measures towards ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols’;⁹²
- ‘The Constitution shall provide that the rights and freedoms set forth in [the main] international instruments and agreements [on fundamental human rights and freedoms] shall be directly applicable in Kosovo’;⁹³
- ‘The President of Kosovo shall represent the unity of the people’;⁹⁴
- The Government of Kosovo and the composition of the civil service are to reflect the diversity of the people of Kosovo;⁹⁵
- A constitutional court is to ‘be composed of nine . . . distinguished jurists of the highest moral character’.⁹⁶

In essence the proposal will create a state of Kosovo, by virtue of supervised statehood: ‘The international community shall supervise, monitor and have all necessary powers to ensure effective and efficient implementation of this Settlement’.⁹⁷ The Comprehensive Proposal, if ultimately acted upon, is a significant development in the role of self-determination, to the detriment of sovereignty and territorial integrity of the state. If the proposal is followed through it would instance a situation whereby a state has been constructed by other states, but a state that was not

⁹¹ Ibid, Article 1.7.

⁹² Ibid, Article 2.1.

⁹³ Ibid, Annex 1, Article 2.1.

⁹⁴ Ibid, Annex 1, Article 4.1.

⁹⁵ Ibid, Annex 1, Article 5.

⁹⁶ Ibid, Annex 1, Article 6.1.

⁹⁷ Article 1.11 of the Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1: note 81 above.

in the past a republic but simply an autonomous unit within a state.⁹⁸ It would also suggest the legality of this procedure: the Guiding Principles issued by the Contact Group incorporated the reference to the fact that the Settlement of the Kosovo issue should be fully compatible with international law.⁹⁹

There is no certainty that the proposals of Martti Ahtisaari will achieve the support of the United Nations and be acted upon. For instance, Serbia's foreign minister responded to the draft proposals by asserting that Belgrade should insist on its right to keep Kosovo.¹⁰⁰ Russia, an ally of the rump former Yugoslav state of Serbia, is likely to oppose any move leading to Kosovar independence, and a similar line from the People's Republic of China can be assumed. The principal point though is the very fact that this proposal has been made and a trend potentially emerges, although the Special Envoy indicates in his Report that the solution for Kosovo 'does not create a precedent for other unresolved conflicts'.¹⁰¹ The proposal speaks of a dynamic to the legal theory of self-determination that is continuing, an extension of the conditions in which the right to self-determination may be justified and a considerable attack on the supposed illegality of unilateral secession.

⁹⁸ This moves beyond, for example, the recognition of Bosnia, a republic within the Socialist Federal Republic of Yugoslavia, at a time when 'clearly it was not one' and further 'had never been a state at all, at least until modern times': Warbrick, note 42 above, 246 and 24. That recognition in itself was beyond what might have been expected: *ibid* 268. The present momentum regarding Kosovo demonstrates the potential construction of a juridical state out of a unit within a subsisting state.

⁹⁹ Guiding Principles, note 78 above; cf the scepticism expressed by Colin Warbrick with reference to this possibility: Warbrick, note 42 above, 246. See also note 77 above. The legitimacy of any settlement needs to be premised on customary rules of international law, as any treaty entered into regarding the settlement would not prevail over obligations of the UN Charter (Article 103 of the Charter), and such obligations include the right to respect for territorial integrity: see Article 2(4) of the UN Charter; also Simpson, note 87 above, 87.

¹⁰⁰ People's Daily Online, 'Serbia insists on right to keep Kosovo' (2007)

<http://english.people.com.cn/200702/05/print20070205_347664.html>, accessed 5 February 2007.

¹⁰¹ Paragraph 15 of the Report of the Special Envoy, note 81 above. See section 7.2 below on questions of state practice and *opinio juris*.

It may thus be that the norm of non-intervention in foreign states appears to be weakening,¹⁰² and this recent instance of intervention by the international community demonstrates that the apparent illegality of unilateral secession is not the absolute prohibition on unilateral external self-determination that it appears to be. This is evident from the situation in Kosovo: the intervention of the United Nations in UN Security Council Resolution 1160 (1998), the NATO bombardment,¹⁰³ the deployment of KFOR under UN Security Council Resolution 1244 (1999), and the proposals of UN mediator Martti Ahtisaari – despite the fact that the ultimate outcome for Kosovo is as yet uncertain. These interventions are indicative of a willingness to tolerate or even encourage unilateral secession,¹⁰⁴ despite the Special Envoy writing in his Report that the solution for Kosovo does not create a precedent.¹⁰⁵ It will be recalled that the UN Security Council resolutions relating to Kosovo confirmed the territorial integrity of the FRY,¹⁰⁶ and yet this appears to be no longer the case, at least so far as the Special Envoy is concerned, and also the Secretary-General of the United Nations.¹⁰⁷

¹⁰² As Warbrick suggests in respect of electoral processes: Warbrick, note 42 above, 238.

¹⁰³ The NATO bombing campaign was launched without authorisation of the UN Security Council: see Radan, note 59 above, 201. It may thus be characterised as unlawful: UN Charter, Article 2(4).

¹⁰⁴ As to the value of the interventions in Kosovo as a potential new trend, see section 7.2 below.

¹⁰⁵ Paragraph 15 of the Report; see note 101 above and related text. See section 7.2 below regarding *opinio juris* and state practice.

¹⁰⁶ For example, Resolution 1244 (1999): note 57 above.

¹⁰⁷ The Secretary-General has given his full support to Martti Ahtisaari's proposals: note 81 above. The proposals also have state support. The British Government, for instance, has welcomed the final settlement proposals, which then Foreign Secretary Margaret Beckett said 'represent a status outcome which the UN Special Envoy has described as independence, supervised by the international community. These proposals would give Kosovo clarity over its future . . . we look forward to working with our partners in the UN Security Council, on the basis of the UN Special Envoy's settlement proposals, to bring the status process through to completion': Foreign and Commonwealth Office, 'UN Proposals for Kosovo's Final Status' (2007)

Accessible at <<http://www.fco.gov.uk>>. A draft resolution on Kosovo was presented to the UN Security Council on 17 July 2007, but agreement could not be secured and discussions on the resolution were put on hold: Statement issued on 20 July 2007, accessible through <<http://www.unosek.org/unosek/index.html>>.

Nevertheless, against the background of a perceived general bar against unilateral secession, in 1996 Hurst Hannum wrote: ‘the notion that there is an internationally recognized right of secession would seem to have advanced only marginally, if at all, in recent years’.¹⁰⁸ Subject to the Kosovo outcome this comment is still of relevance, despite suggestions of choice theorists and remedial right theorists to the contrary. Even so, the political will to intervene or not to intervene is of evident importance. The theory of self-determination is dynamic, evidenced particularly in Kosovo, but *realpolitik* is key. The theory, though, relates not only to external self-determination but also to internal self-determination, and in the context of the dynamic theory of self-determination it is pertinent to consider issues of autonomy further, and whether the injustices perpetrated in Tibet can be resolved without recourse to the ultimate resort of secession.

6.4 Enhanced Autonomy and Autonomy Light

Among the range of options on offer as part of the evolving concept of self-determination is autonomy, and indeed schemes of autonomy ‘have been offered to placate secessionist sentiments and maintain State cohesion, although it is feared such schemes could be a prelude to independence claims, by weakening the central government’.¹⁰⁹ Generally, autonomy is seen as involving issues relating to: ‘language; education; access to governmental civil service, including police and security forces, and social services; land and natural resources; and representative local government structures’.¹¹⁰ It is worthwhile to look at these elements in the Tibetan context, and with reference to the 1982 Constitution of the People’s Republic

¹⁰⁸ Hannum, note 43 above, 499.

¹⁰⁹ Thio, note 9 above, 331-332; see also Pazartzis, note 30 above, 373. Li-ann Thio cites examples of autonomy offered to Tamil insurrectionists in Sri Lanka, to West Papua and Aceh by Indonesia, and to Mindanao by the Philippines.

¹¹⁰ Hannum, note 43 above, 458.

of China, for essentially autonomy may be considered ‘as a realization of the principle of internal self-determination in the form of self-governance’,¹¹¹ and it is of significance that the 1982 Constitution provides for regional autonomy for the minority nationalities, one of such regions being the Tibet Autonomous Region (TAR).¹¹²

6.4.1 Elements of Autonomy

The 1982 Constitution circumscribes the right to autonomy in Article 115, and the limits of the authority of the organs of self-government to exercise the right of autonomy are prescribed as mentioned therein.¹¹³ Against that background, however, by Article 3 of the Constitution ‘The people of all nationalities have the freedom to use and develop their own spoken and written language, and to preserve their own ways or customs.’ We have already seen, nevertheless,¹¹⁴ that the Tibetan language has not been studied in schools, the main teaching language has been Chinese, and that the Chinese language has dominated areas of business and also governance, even though Article 121 of the Constitution provides: **‘In performing their functions, the organs of self-government of the national autonomous areas, in accordance with the autonomy regulations of the respective areas, employ the spoken and written language or languages in common use in the locality.’**¹¹⁵ There is, however, some evidence of an improving situation, though the effect of the Tibetan Language Law 2002 is as yet uncertain.¹¹⁶ Language, in particular as a medium of education, is important, and pilot projects during the last decade of the twentieth century showed

¹¹¹ Loukacheva N, ‘On Autonomy and Law’ (2004) Working Paper for Globalization and Autonomy Accessible at <<http://www.globalautonomy.ca>>, via <<http://anscombe.mcmaster.ca/global1/news.jsp>>.

¹¹² Article 4 of the Constitution.

¹¹³ See section 3.5.2 above.

¹¹⁴ Section 5.4.2 above.

¹¹⁵ Emboldened text in original.

¹¹⁶ See section 5.5 above.

that Tibetan students educated in the Tibetan language produced better examination results than those educated in the Chinese language.¹¹⁷

Thus language should not be seen simply as a cultural issue, a part of what it means to be a Tibetan. It has real value and relevance in the economic world. Nevertheless, culture, too, is significant here, and China regards it as so:

Since the late 20th century the focus of much writing on China's minorities and national identification program has been on the 'civilizing mission' of China's policy toward its 'backward minorities' . . . Minorities, generally less educated in the Chinese school system than the Han majority, are thought to be somewhere behind the Han culturally. Education plays a privileged role in executing China's national integration project.¹¹⁸

If education, business and administration in the TAR are not carried out in Tibetan, those with Tibetan as their mother tongue are disadvantaged. Yet it cannot be in the interests of the People's Republic to disadvantage the Tibetan minority in this way. The central government has spent huge sums in Tibet in a bid to raise the region economically: sustainable economic development requires Tibetans to improve individual economic standards and anything that disadvantages them in this regard is counter-productive – for example, where Han Chinese possess better linguistic and technical skills, they will take business away from the local Tibetans,¹¹⁹ and where

¹¹⁷ Dawa Norbu, 'Economic Policy and Practice in Contemporary Tibet' in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 152-165, 163.

¹¹⁸ Gladney DC, *Dislocating China: Reflections on Muslims, Minorities, and Other Subaltern Subjects* (London: Hurst & Company, 2004) 261.

¹¹⁹ He Baogang, 'The Dalai Lama's Autonomy Proposal: A One-Sided Wish?' in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 67-84, 79.

local Tibetans are educated in Chinese and business is conducted in Chinese there is a high probability that Tibetans will be disadvantaged linguistically.

By Article 119 of the Constitution, education is to be independently administered by the organs of self-government of the TAR. As is evident, however, education is very much linked with language, and the topic has been examined above.¹²⁰ Failure rate of Tibetan students has been high, due to the language-medium of education, and attendance has been patchy if not poor. For Tibetans, autonomy needs to incorporate compulsory education in the Tibetan language. Compulsory education at least at primary level should be feasible to attain, not only among Tibetans, in compliance with the Millennium Goals of the United Nations.¹²¹

As to access to governmental civil service, including police and security forces, and social services, it is the case that the TAR has such access, but that the services and forces are under the control of the central government of the People's Republic. The establishment of martial law in Tibet on 7 March 1989 exemplifies this, and it is of course the security of the motherland, the unity of the country, that is emphasised in the 1982 Constitution.¹²² Social services also, for instance the right of the old, ill or disabled to material assistance, are in the hands of the state.¹²³ This is a sphere where the People's Republic of China would clearly be intent on retaining its power, certainly so far as police and security forces are concerned. Yet in itself that need not defeat any drive towards an agreed autonomous Tibet. In 2003, the Dalai Lama

¹²⁰ Section 5.4.2.

¹²¹ UN [United Nations], 'UN Millennium Goals' (2005)
<<http://www.un.org/millenniumgoals/>>, accessed 23 June 2006.

¹²² See, for example, Articles 52 and 54.

¹²³ Article 45.

indicated ‘that the numbers of the People’s Armed Police should be reduced in Tibetan cities, implying his acceptance of the stationing of Chinese troops’.¹²⁴

Land and natural resources are areas of direct conflict in the Sino-Tibetan context. The issue for China of territorial integrity incorporates its sovereignty over the land comprising Tibet,¹²⁵ and its attendant right to extract natural resources from the land. Tibet has abundant natural resources that have been exploited over the decades by the People’s Republic: ‘The gold-bearing sands of cultural Tibet have been renowned for centuries. Less well known are the area’s other rare metals, including lithium, lead, antimony, and, it is rumored, uranium. There are also coal deposits and an abundance of salt.’¹²⁶ Such autonomy as the TAR has enjoyed under the People’s Republic to date has clearly not incorporated autonomy over its land and natural resources. Indeed, by virtue of the 1982 Constitution, mineral resources are owned by the state, as is land.¹²⁷

Representative local government structures are in place within the TAR and have been so in one form or another since the advent of the Seventeen-Point Agreement in 1951.¹²⁸ The right of the Tibetan people to exercise regional autonomy was referred to in Article 3 thereof, and to a greater or lesser extent the People’s Republic contends

¹²⁴ He Baogang, note 119 above, 71. This stance of the Dalai Lama could equally, however, imply an acceptance by the Dalai Lama that the PRC would not agree a situation whereby all Chinese troops were withdrawn from Tibet.

¹²⁵ Both areas of ethnographic Tibet outside the TAR and the TAR itself.

¹²⁶ Dreyer JT, ‘Economic Development in Tibet Under the People’s Republic of China’ in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 129-151, 130. See also Avedon JF, *In Exile from the Land of Snows: The Dalai Lama and Tibet Since the Chinese Conquest* (New York: HarperPerennial, 1994, reissued 1997) 41.

¹²⁷ Articles 9 and 10 respectively. Further, nuclear sites and installations within ethnographic Tibet, and the strategic initiative given to China by its control over the Tibetan plateau, reinforced by the 1982 Constitution and China’s emphasis on sovereignty and territorial integrity, will ensure that China is not prepared to willingly divest itself of land or mineral resources contained within Tibet: see section 4.4.2.2 above.

¹²⁸ The Agreement on Measures for the Peaceful Liberation of Tibet: see section 3.3 above.

that a system based on autonomy has been in place thereafter.¹²⁹ However, Chinese officials have held leadership positions in Tibet and ‘in September 2000 a class of some seventy ethnic Chinese was opened at Tibet University specifically to train future Chinese officials so they could take up leadership positions in Tibetan counties and townships’.¹³⁰ Consequently, opportunities for ethnic Tibetans to take up official positions within Tibet are limited. Thus it is arguable that what are ‘representative’ local government structures in fact lack the element of representation in that committees and local government structures are heavily influenced by and may be dominated by Han Chinese.

Despite this Robert Barnett argues that Tibetan politicians in Tibet are not wholly without power or influence, even though ‘a politics of ethnic superiority’ has been created in Tibet.¹³¹ There is ‘contempt of Chinese officialdom for their Tibetan colleagues’.¹³² This contempt chimes in with the general superiority evinced by the Han Chinese toward the country’s ‘backward minorities’,¹³³ and emphasises also the present limitations on local government structures being representative within the TAR. It equally has bearing on the meaning of autonomy itself in Tibet.

6.4.2 The Meaning of Autonomy in Tibet

Autonomy in Tibet means different things for the People’s Republic, on the one hand, and for Tibetans, on the other, and ‘The debates over what kind of autonomy should be implemented in Tibet stem from different theoretical sources and positions. While

¹²⁹ See, for example, Article 4 of the 1982 Constitution.

¹³⁰ Barnett R, ‘Beyond the Collaborator – Martyr Model: Strategies of Compliance, Opportunism, and Opposition Within Tibet’ in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 25-66, 45.

¹³¹ Ibid 49.

¹³² Ibid 50.

¹³³ See, for example, note 118 above and related text; also Chapter 5, note 171.

the Dalai Lama's *genuine* autonomy proposal draws on liberal principles of autonomy, the official Chinese conception of *regional* autonomy derives from Marxist principles.'¹³⁴ Autonomy as practised in the TAR is, of course, that understood by the People's Republic.

In the previous section we have noted how, in practice, issues surrounding language and education have turned out. The freedom to practise religion is a further area of significance for autonomy in Tibet. Destruction of the monasteries and oppression of the monkhood took place in Tibet after the Dalai Lama's departure in 1959 and particularly during the Cultural Revolution, although subsequent thereto there has been an easing of policy by the central government.¹³⁵ Even so, there remain limits on the numbers who may become monks and pilgrimage is controlled.¹³⁶ Both these restrictions are contrary to Tibetan cultural autonomy.

Even where laws and directives are in place, these are not necessarily put into effect. For example, despite the adoption in 1987, by the TAR's People's Congress, of Regulations on the Study, Use, and Development of the Written Tibetan Language for trial implementation, plans for middle school texts to be written in Tibetan and for most school subjects to be taught in Tibetan have been abandoned. Almost all subjects, certainly after primary school, are still taught in Chinese and, although directives have been issued by the central government to Chinese residents in the TAR to learn Tibetan, these are largely ignored. All this leads to the disadvantage of Tibetans in the TAR, and this is compounded by the fact that, not unnaturally,

¹³⁴ He Baogang, note 119 above, 73 (emphasis in original).

¹³⁵ See section 5.4.1 above.

¹³⁶ He Baogang, note 119 above, 77.

officials and factory managers who speak only Chinese tend to prefer to employ people able to speak Chinese; this excludes many ethnic Tibetans.¹³⁷

Turning to the question of political autonomy, the limited opportunity for Tibetans to take up official positions in the TAR has been noted, but although the majority of high-ranking Tibetan cadres hold only titular and nominal power, an ever-increasing number of Tibetan cadres hold posts at lower levels in government and also ever-larger numbers are admitted to the Chinese Communist Party (CCP). Thus the People's Republic can claim that there is an element of power sharing and also some form of limited autonomy.¹³⁸ However, as noted in section 3.5.2 above, local laws cannot override national law; in consequence central authority, central government, is dominant. Specific regulations of the TAR have to be submitted to the Standing Committee of the National People's Congress for approval before they go into effect,¹³⁹ and thus such regulations are subject to veto by the Standing Committee at national level.

Consequently, the autonomy enjoyed by the TAR is limited in scope and does not accord with, for example, the Dalai Lama's proposals as presented at Strasbourg on 15 June 1988 and addressed to the European Parliament.¹⁴⁰ The five-point plan called, inter alia, for negotiations between the Tibetans and the Chinese and, while the Government of the People's Republic would retain responsibility for Tibet's foreign

¹³⁷ Ibid 78. See also section 5.5 above.

¹³⁸ Ibid 76; cadres comprise members of groups of activists in a communist or other revolutionary party: *The Concise Oxford Dictionary of Current English*, Ninth Edition (Oxford: Clarendon Press, 1995). Tibetans in 1980 comprised as many as 85% of the members of the Tibetan Political Consultation Committee, but only 22% of the Tibetan Party Committee and 54% of the Tibetan People's Congress; also in 1991 the CCP had more than 57,000 Tibetan and other minority members: He Baogang, *ibid*, 76-77.

¹³⁹ Article 116 of the 1982 Chinese Constitution; see also Article 115.

¹⁴⁰ See section 4.4.2.4 above.

policy, the Dalai Lama's thinking was that a Tibetan government, founded on a constitution or basic law should:

develop and maintain relations, through its own foreign affairs bureau, in the field of commerce, education, culture, religion, tourism, science, sports and other non-political activities . . . The basic law should provide for a democratic system of government entrusted with the task of ensuring economic equality, social justice, and the protection of the environment. This means that the Government of Tibet will have the rights to decide on all affairs relating to Tibet and the Tibetans.¹⁴¹

The Dalai Lama's Strasbourg Proposal envisaged a genuine autonomy for Tibet 'within the framework of the People's Republic of China . . . with Tibetans fully responsible for their own domestic affairs, including the education of their children, religious affairs, cultural matters, the care of their delicate and precious environment, and the local economy. Beijing would continue to be responsible for the conduct of foreign and defense matters.'¹⁴² However, Beijing has not felt able to engage on the Dalai Lama's proposals.¹⁴³ The Dalai Lama appealed in this respect in the 2001 speech to the international community, and it is of relevance that the European Union engages at high level with the People's Republic of China.¹⁴⁴

There are a number of reasons why the People's Republic rejects the Dalai Lama's proposals. He Baogang, for instance, cites fear that acceptance could lead ultimately

¹⁴¹ Office of His Holiness the Dalai Lama (The), 'Strasbourg Proposal 1988: Address to the Members of the European Parliament, Strasbourg, France: June 15, 1988' (1988)
<<http://www.dalailama.com/page.96.htm>>, accessed 30 January 2007.

¹⁴² Office of His Holiness the Dalai Lama (The), 'Speech of His Holiness the Dalai Lama to the European Parliament, Strasbourg: October 14, 2001' (2001)
<<http://www.dalailama.com/page.99.htm>>, accessed 30 January 2007. There is thus at least an implicit acknowledgement of China's present-day sovereignty over Tibet.

¹⁴³ Ibid.

¹⁴⁴ See, for example, references at section 5.3.3 to China-EU summits.

to full independence for Tibet, a reluctance to agree to the idea of the chief executive in Tibet being elected, the unacceptability of demands that autonomy for Tibet should extend beyond the TAR into ethnographic Tibet, the unacceptability of the withdrawal of Chinese troops as a precondition for negotiation, the failure of the Dalai Lama to publicly make a commitment that Tibet is an inalienable part of China, the rejection of liberal principles of autonomy and rejection of the applicability of the right of self-determination to minorities in China, the fact that the Dalai Lama has brought the Tibet Question into international focus, and the fact that regional autonomy for minority nationalities already exists in China.¹⁴⁵ At the root of the matter Hu Jintao, the general secretary and president of the People's Republic, has stated that 'it is essential to fight unequivocally against the separatist activities by the Dalai clique and anti-China forces in the world, vigorously develop a good situation of stability and unity in Tibet and firmly safeguard national unity and state security'.¹⁴⁶

Despite this failure to negotiate, benefits in resolving the Tibet Question are apparent for the People's Republic, for example in the potential to enhance the state's international image and also indeed in respect of increased stability and unity.¹⁴⁷ Tibet continues to enjoy the benefit of autonomous status within the People's Republic, at least so far as the area of the TAR is concerned. It is clear, however, that the autonomy, the internal self-determination, Tibet has is viewed with cynicism by Tibetans and by those taking their part in the Sino-Tibetan discourse. The Dalai Lama's moves towards an enhanced autonomy have not come to fruition, and essentially an impasse has been reached.

¹⁴⁵ He Baogang, note 119, above 80.

¹⁴⁶ Quoted at He Baogang, *ibid.* The People's Republic thus also implicitly brings into the equation the current agenda of the 'War against Terror', although the 2001 remarks by Hu Jintao pre-date the terror attacks of 9/11.

¹⁴⁷ Office of His Holiness the Dalai Lama (The) (2001), note 142 above.

The need is for Tibet to gain a greater control over its own affairs. It has been suggested that it is in the interests of the Tibetan elites to decouple religion and politics – ‘an adoption of democracy by the Tibetan government in exile’.¹⁴⁸ The argument is based, for example, on a greater legitimisation, formulation of clearly defined Tibetan goals, the potential for violent resistance,¹⁴⁹ and uniting Tibetans behind political figures subject to election rather than a reincarnating religious leader.¹⁵⁰ All these arguments are pertinent. There are though two particular factors to highlight here. The first is that Tibetans cannot afford to have the equivalent of a regency on the death of the present Dalai Lama. The weakness of effectively an interregnum before a successor attains his majority, and a successor chosen by whom, can only be damaging to Tibetan goals.¹⁵¹ Secondly, ‘The Han elite has a strong tendency to regard religion as antithetical to modernization.’¹⁵² The views of the People’s Republic on religion are well documented, as are the country’s views on the splittist activities of the Dalai Lama. A greater emphasis on politics rather than religion in Tibetan circles should enable Tibetans to strengthen the political argument for their own self-determination and, at the same time, is likely to be welcomed in the People’s Republic.

6.5 The Tibet Question and Supervised Statehood

Resolution of the Tibet Question is in both the Tibetan and Chinese interests as with the ageing of the Dalai Lama a natural watershed approaches. Both sides have much

¹⁴⁸ Ardley J, *The Tibetan Independence Movement: Political, religious and Gandhian perspectives* (London and New York: RoutledgeCurzon, 2002) 171.

¹⁴⁹ Violence is antithetical to Buddhist teachings and creeds.

¹⁵⁰ Ardley, note 148 above, 172ff.

¹⁵¹ In addition, the interregnum would be of indeterminate length: the immediate successor, or successors, may fail to attain the age of majority as happened during the nineteenth century.

¹⁵² Yu Changjiang, ‘Life in Lara Village, Tibet’ in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 258-282, 281.

to risk if the impasse continues; for instance, a violent outcome, potentially involving revolution and repression, could destroy Tibet and its culture, but could also leave the People's Republic as a pariah in the international community. It is clear from this thesis that the concepts of self-determination and also sovereignty evolve; but Tibet has as yet been unable to find advantage in either concept. In the absence of a conclusion based on satisfactory autonomy, the doctrine of external self-determination merits further examination in seeking a solution to the Tibetan problem.

It has proved difficult to fit notions of sovereignty and self-determination into the context of the Sino-Tibetan relationship, and it has been argued persuasively that the West has framed the debate on the Tibet Question:

There is *no neutral historical 'truth'* that can resolve whether Tibet was always an independent nation or an integral part of China. What is more important is to recognize historical developments that have contributed to the framing of the question in absolutist terms of sovereignty or independence, something that was alien to both the Chinese and the Tibetans before the twentieth century.¹⁵³

As a result, Dibyesh Anand suggests that sovereignty and self-determination provide the wrong framing for the Tibet Question, and believes that the debate should move beyond conventional international politics, where *realpolitik* is emphasised, in order to solve the Tibet issue.¹⁵⁴ I believe that is unnecessary. It is indeed undesirable that this be the case: the issue needs to be resolved within the present international system

¹⁵³ Dibyesh Anand, 'The Tibet Question and the West: Issues of Sovereignty, Identity, and Representation' in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 285-304, 287, emphasis in original. See also Dibyesh Anand, 'Western Colonial Representations of the Other: The Case of Exotica Tibet' (2007) 29(1) *New Political Science* 23-42, 41.

¹⁵⁴ Dibyesh Anand (2006), *ibid*, 287 and 297.

and can be. It is in this respect that the concept of supervised statehood emanating from the UN mediator in Kosovo comes to the fore.

Supervised statehood as a concept brings an added dimension into international law, having the potential to expand the ambit of the principle of external self-determination. It emphasises the global reach of the international community, and adds to the growing pressures of international human rights on sovereignty. Thus the mapping of international law itself evolves, commensurate with the idea that 'The globalisation of the principle of sovereignty and the aggressive legitimation of state power by reference to morality and human rights leaves no-one and nothing untouched.'¹⁵⁵ Indeed, Costas Douzinas is moved to comment that 'Human rights have become the *raison d'être* of the state system as its main constituents are challenged by economic, social and cultural trends'.¹⁵⁶

The proposals of Martti Ahtisaari indicate that the international order has taken on a new dimension, and as a result that nation states are not necessarily defined by their physical territorial boundaries. Other factors may be relevant, and one of these may be ethnicity, or ethnographic boundaries. Kosovars did not think of themselves as Yugoslavs, and particularly not as Serbs.¹⁵⁷ A sense of community becomes significant, a shared language, a shared culture.

Michael van Walt van Praag has previously promulgated a solution to the Tibet Question in the form of a free association between Tibet and the People's Republic of China, suggesting that this is an arrangement that could be satisfactory to Tibetans, at

¹⁵⁵ Douzinas C, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000) 374.

¹⁵⁶ Ibid; hence the People's Republic's intent to justify its human rights policies in the publication of annual White Papers: see section 5.3.2 above. As to oppression and abuses of human rights in Tibet, see section 5.4 above, particularly section 5.4.1 with regard to violations characterised by abuse and torture; also section 3.4 above.

¹⁵⁷ Thus the attempt to secede from Serbia, if not from Yugoslavia, in 1990: section 6.3.2 above.

the same time safeguarding the primary interests of the People's Republic.¹⁵⁸ The initial problem here though is evident in the first of the features of free association listed by van Walt van Praag: 'the relationship must be a consensual one between two sovereign States . . .'.¹⁵⁹ Again the issue of statehood and territorial integrity arises – the centrepiece of the Tibet Question.

Nevertheless, the concept of free association now finds an echo in the supervised statehood mooted with reference to Kosovo. It is in the Comprehensive Proposal for the Kosovo Status Settlement that the solution to the Tibet Question may be sought, for, although the ultimate outcome of this proposal is by no means certain, what can be said is that the very proposal and its mandate for supervised statehood open the door potentially for independence – thus focusing on the central issue of the Tibet Question.¹⁶⁰

The Kosovo Status Settlement is a new and important development in the doctrine of self-determination, prospectively a new interpretation of the international order. Kosovo can be distinguished from states created following the break-up of the Soviet Union and also from the states created from the other constituent parts of Yugoslavia in that it has enjoyed the status of an autonomous province, not a republic. Under the

¹⁵⁸ Van Walt van Praag MC, *The Status of Tibet: History, Rights, and Prospects in International Law* (London: Wisdom Publications, 1987) 201; referring also to Principle VII of UNGA Resolution 1541 (XV) of 1960, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter. It should be borne in mind that van Walt van Praag is a proponent of the argument that Tibet was an independent state at the time of the 1950 Chinese invasion (ibid 141), yet his proposal is not one directly and immediately pursuing a claim for historical sovereignty, rather it is the solution of a free association, with Tibet as the associate state, having the right, for example, to be a member of international organisations, including the UN, and thus 'Tibet would thereby resume the exercise of its sovereignty, but China would assume the desired degree of responsibility for Tibet's foreign relations and defense . . . the more satisfactory solution of the Sino-Tibetan question in the long run, however, would be . . . the reemergence of Tibet as a sovereign State in law and fact' (ibid 202).

¹⁵⁹ Ibid 201.

¹⁶⁰ See Lazar E, 'Afterword' in E Lazar (ed.), *Tibet: The Issue is Independence* (Berkeley, CA: Parallax Press, 1994) 84, as to 'the central issue of Tibetan independence'. State opposition to Ahtisaari's proposals is inevitable, for example from Serbia, Russia and also the PRC: see section 6.3.3 above.

1974 Constitution, Kosovo was a constituent part of the Socialist Republic of Serbia and was recognised as such. In that, it bears similarities to the Tibet Autonomous Region under the Chinese Constitution.

While the People's Republic of China is 'a unitary multi-national state',¹⁶¹ and therefore distinguishable from the former Soviet Union and the former Yugoslavia, for example, this distinction loses potency by virtue of the fact that both Kosovo and Tibet are in essence autonomous regions. The Constitution of Serbia, of 28 September 1990, in its Preamble states that 'Contrary to constitutional definition of multi-national states – independent or federal units – both in the world and in our country, the Constitution of Serbia does not define the State by applying the ethnic criterion' and in addition that 'According to the new Constitution of Serbia, only one State does exist, as everywhere in the world, in the territory of the single State of Serbia.'¹⁶² Thus the Republic of Serbia, at the time when it was a part of the Socialist Federal Republic of Yugoslavia, stressed its territorial integrity, as indeed does the People's Republic of China. The Preamble goes on to refer to the units of territorial autonomy, formerly known as autonomous provinces, which are without state functions. By Article 6, the Republic of Serbia included the Autonomous Province of Kosovo and Metohija, which is expressed to have a form of territorial autonomy.

The Constitution of the Federal Republic of Yugoslavia,¹⁶³ comprising Serbia and Montenegro, promulgated on 27 April 1992, in turn refers to the Federal Republic of Yugoslavia 'as a sovereign federal state',¹⁶⁴ and in Article 3 refers to the territory of

¹⁶¹ Preamble to the 1982 Constitution of the People's Republic of China.

¹⁶² The Constitution of the Republic of Serbia, 28 September 1990.

¹⁶³ Translation of the Constitution of the Federal Republic of Yugoslavia is reprinted in Trifunovska, note 58 above, 534-565.

¹⁶⁴ Article 1. Montenegro declared independence from Serbia and seceded consensually following a referendum on 21 May 2006, and was admitted to the United Nations on 28 June 2006: see, for example, BBC News, 'Montenegro declares independence' (2006)

the Federal Republic of Yugoslavia as a single entity. No specific mention is made of Kosovo, which is an integral part of Serbia and therefore a unit within the Federal Republic of Yugoslavia. The People's Republic of China operates under a system of democratic centralism,¹⁶⁵ practising regional autonomy on the basis that 'All the national autonomous areas are inalienable parts of the People's Republic of China'.¹⁶⁶ Thus here one state exists, the People's Republic, and an autonomous area within that state is the TAR. Both Kosovo and Tibet therefore had autonomous status within the parent state; neither had the status of a republic.

If Martti Ahtisaari's proposals comply with international law, and it was a prerequisite of the Settlement that they should,¹⁶⁷ then it would appear that secession by an autonomous region is potentially legitimated. This then would provide a basis for legitimising secession from the People's Republic by Tibet, and is potentially of profound significance in the context of the Tibet Question. The particular significance, though, is for the TAR, and the people of the TAR, rather than for ethnographic Tibet as a whole. It is secession for an autonomous region that is potentially legitimised, rather than for a people, an ethnic group, as a whole. This effectively builds on the views of the Badinter Commission: 'Although the definition of a people as the total population of a state was rejected by the EC and the Badinter Commission, the meaning of people based upon the nation was not accepted in its entirety. Instead the population of a sub-state territorial unit was deemed to be a people.'¹⁶⁸ Thus Ahtisaari extends the meaning of people to those based in an autonomous region, in the case of Tibet the TAR. Consequently the Kosovo

<<http://news.bbc.co.uk/1/hi/world/europe/5043462.stm>>, accessed 14 September 2007, and also <<http://www.un.org/members/list.shtml>>.

¹⁶⁵ Article 3 of the 1982 Constitution.

¹⁶⁶ Article 4.

¹⁶⁷ See Guiding Principles of the Contact Group, notes 77 and 78 above. See also section 7.2 below.

¹⁶⁸ Radan, note 59 above; by reference to Badinter Commission, Opinion No. 2, note 63 above.

Settlement has implications for 'people' in the Tibetan context: it is the people within the specific unit of the TAR to which the Settlement has relevance.

In addition, human rights are emphasised by the Contact Group. Thus credence appears to be given to the remedial right theory of self-determination. There is now a clear case for Tibet to seek to build on the trend emanating from the draft Comprehensive Proposal for a Kosovo Status Settlement, within the confines of international law, and seek to claim external self-determination through supervised statehood based on the remedial right theory. This trend and the potential developments form the basis for the discussion in the concluding chapter that follows, as implications for both Tibet and for public international law and its norms are considered.

7 Conclusions

7.1 Opening Remarks

Against the backdrop of Tibet this thesis has conducted an examination of the legal theory of self-determination and its limitations, demonstrating that to date norms of public international law have failed to resolve the Tibet Question. Principles not only of self-determination but also of sovereignty and territorial integrity and human rights have been analysed, and it is evident that these concepts are not static; rather, they are dynamic. Concepts such as sovereignty are overriding principles of international law, forming a body of *jus cogens*, from which no derogation is permitted,¹ and this thesis contends that self-determination, which is certainly of *erga omnes* character, has achieved the status of *jus cogens*.²

Norms of international law have to accommodate each other in a rapidly changing world, and exceptions to them arise, either reaffirming the existence of the relevant norm or leading to the creation of new norms. Changing ideas of sovereignty and self-determination have been focused upon in the thesis and I have sought to explain how the international legal system and legal theory have impacted on the relationship between China and Tibet and why Tibet has been unsuccessful in promulgating claims to statehood and to self-determination. In this concluding chapter the validity of the proposed Kosovo Status Settlement will be examined, while emphasis will be given to the effect that the proposed settlement in Kosovo may have on the Tibet Question and the importance evolving concepts of self-determination may have for

¹ See Chapter 4, notes 6 and 60; also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, 14.

² See section 2.4.1 above.

Tibetans. The perspective will provide a new focus for the issue, and in the final section of the chapter the pressures on and implications for public international law and its norms, emanating from the long-standing failure to bring about a resolution of the issues surrounding Tibet, will be discussed, in a context where the important legal principle of self-determination shows dynamic potential to extend its reach and what has been perceived as a general prohibition on unilateral secession has been called into question.

7.2 The Kosovo Status Settlement: A New Development

The evolution of the legal theory of self-determination has come at the expense of legal norms of sovereignty and territorial integrity, and, before turning to consider the prospective effect on Tibet of the Kosovo Status Settlement, it is necessary to consider if the Final Comprehensive Proposal for a Kosovo Status Settlement complies with international law, would realise a further extension of the theory of self-determination, or would have the potential to further extend the theory.

It will be recalled that the Contact Group in its Guiding Principles provided that the settlement in Kosovo should be compatible with international law.³ Compatibility is required, therefore, to international norms of human rights, sovereignty and territorial integrity, and also self-determination. The question is one of how such compatibility is to be determined, and that determination will fall to the international community in the forum of the United Nations.

If the proposals of Martti Ahtisaari are approved and come to fruition they will represent an extension of the theory of self-determination. They clearly represent a

³ Section 6.3.3 above.

new development, a development that comprises state building from the outside and one that challenges references in UN Security Council Resolutions, inter alia, to the commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (FRY).⁴ Two factors then come into the equation: the first, as to how such a conclusion of an independent Kosovo is to be legitimated; the second, as to whether it will create a precedent despite the statement in the Special Envoy's Report that the solution for Kosovo 'does not create a precedent for other unresolved conflicts'.⁵

The UN Security Council is seised of the Kosovo conflict, as evidenced by the various resolutions it has passed in this respect and by the Secretary-General's Letter of 26 March 2007,⁶ but the operation of peremptory norms does impose legal limits on the Security Council. The Security Council is required to act 'in accordance with the Purposes and Principles of the United Nations',⁷ and 'the UN Charter cannot be construed as authorizing any organ to act in violation of jus cogens'.⁸ For a valid and binding Security Council action to exist, therefore, principles having *jus cogens* effect must be complied with, yet it is apparent that the Security Council is able to breach such principles in a variety of ways.⁹ However, that breach does not prejudice the applicability of that norm and the encroachment on a norm having the effect of *jus cogens* is outside the Council's competence: the resolution may be void if it offends

⁴ See Chapter 6, note 67 above, and related text.

⁵ Paragraph 15 of the Report of the Special Envoy of the Secretary-General on Kosovo's future status, annexed to a Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168. This statement may have been inserted in the Special Envoy's Report because to date there has been no state practice backed up by *opinio juris* to warrant the solution being a precedent. However, as argued below in this section, this is not to say the potential for a precedent does not exist.

⁶ Ibid.

⁷ UN Charter, Article 24(2).

⁸ Orakhelashvili A, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16(1) *European Journal of International Law* 59-88, 69.

⁹ Orakhelashvili, *ibid*, 77, and his analysis preceding; also 67.

jus cogens,¹⁰ and thus the Security Council is not unconstrained by international norms. Nevertheless, although *jus cogens* may limit the action of the Security Council, it is feasible for a Security Council resolution to continue in force although ‘repugnant in the eyes of the international community’.¹¹

The norm of sovereignty is a *jus cogens* norm, and will be violated if Kosovo achieves independence without the agreement of the FRY. The reaction to this situation by the UN General Assembly would be instructive, and issues of customary international law and *opinio juris* become relevant: ‘international custom, as evidence of a general practice accepted as law’ is one of the formal sources from which the rule of law derives validity.¹² The principles within the Kosovo Status Settlement have the potential to constitute development of state practice, and therefore customary international law. The substance of customary rules is located ‘primarily in the actual practice and *opinio juris* of States’.¹³ Self-determination itself is a general principle of international law, a norm certainly *erga omnes* and, as argued, of *jus cogens*, and may be expanded by customary international law.

Opinio juris should be ascertained ‘from the fact of the external evidence of a certain custom and its necessity felt in the international community’, although ‘for it to become binding, a rule or principle of international law need not pass the test of universal acceptance’.¹⁴ The Kosovo Status Settlement does result from work under the auspices of the United Nations, and it is of relevance that ‘the passage of only a

¹⁰ Ibid 79, 84-88.

¹¹ Ibid 88.

¹² Statute of the International Court of Justice, Article 38(1), annexed to the Charter of the United Nations; see also Harris DJ, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004) 19.

¹³ *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Judgment of 3 June 1985, ICJ Reports 1985, 13, para. 27. See also *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996, 226, para. 64, accessible at <<http://www.icj-cij.org/docket/files/95/7495.pdf>>.

¹⁴ Harris, note 12 above, 31 and 32 respectively.

short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law'.¹⁵ There is therefore the possibility of the UN General Assembly recognising the rapid emergence of a new rule of customary law based on the Kosovo Status Settlement – on the recent practice of states.¹⁶ While by itself and in its initiation the Kosovo Status Settlement, if approved, does not necessarily constitute a definitive development in the principle of self-determination, it sets a trend, which has the potential to realise a further extension of the theory, an extension from which Tibet may be able to benefit. General Assembly resolutions may found proof of *opinio juris*,¹⁷ and 'must be considered a part of state practice',¹⁸ from which customary law can be inferred.¹⁹ Blaine Sloan suggests that:

In indicating an *opinio juris* on the part of the States Members, Assembly resolutions may supply the missing element in a line of existing State practice and thus consummate usage into custom . . . or they may inspire practice which will develop into law . . . Resolutions adopted in a particular case might also be practice accompanied by *opinio juris* . . . It is possible, however, that an *opinio juris* expressed in a resolution of the General Assembly will be itself sufficient, or may stimulate a practice which will eventually be consolidated into customary international law.²⁰

The views of states of course remain crucial despite the views of writers,²¹ yet there is clear potential for a rule of customary international law to emerge in validation of the supervised statehood proposals put forward under the Kosovo Status Settlement, thus

¹⁵ Ibid 27.

¹⁶ Ibid 31.

¹⁷ Ibid 39.

¹⁸ Sloan B, *United Nations General Assembly Resolutions in Our Changing World* (1991) 71-75, quoted in Harris, note 12 above, 55.

¹⁹ See also *Nicaragua v United States of America*, note 1 above, para. 188.

²⁰ Sloan quoted in Harris, note 12 above, 57.

²¹ Harris, note 12 above, 59.

expanding the principle of self-determination even though the Special Envoy has specified that the Kosovo solution does not create a precedent.²² This expansion has the capacity to be of significance for the Tibet Question.

7.3 A Kosovan Focus for Tibet

The thesis has demonstrated the primacy in international law of the concepts of sovereignty and territorial integrity, the importance of an entity being able to establish statehood. Sovereignty as a construct has been developed from its Western roots in the Treaty of Westphalia of 1648,²³ and it is in this Western construct that the Tibet Question has been formulated. The international community as a whole has not recognised that Tibet meets the criteria for statehood, the criteria being those specified in Article 1 of the Montevideo Convention on Rights and Duties of States.²⁴ The importance of recognition to statehood, although not a criterion for statehood, has been emphasised.²⁵

Tibetans, by virtue of their lack of participation in the larger community during the first half of the twentieth century, by their failure to participate in international organisations such as the League of Nations and by their failure to modernise, have been unable to mount a convincing case to establish that Tibet was an independent

²² The principle of self-determination is itself a part of customary international law: *Western Sahara Case*, ICJ Reports 1975, 12, para. 56; see also section 2.2 above.

²³ 'The effect of the Peace of Westphalia was to consolidate the existing States and principalities (including those whose existence or autonomy it recognized or established) at the expense of the Empire, and ultimately at the expense of the notion of the *civitas gentium maxima* – the universal community of mankind transcending the authority of States': Crawford J, *The Creation of States in International Law*, Second Edition (Oxford: Clarendon Press, 2006) 10.

²⁴ 165 LNTS 19. The Convention was signed at Montevideo on 26 December 1933 and entered into force on 26 December 1934.

²⁵ See Chapter 4, note 17 and section 4.2.2 above. It is also exemplified by the Arbitration Commission of the Conference for Peace in Yugoslavia, Opinion No. 8 (1992) 31 *International Legal Materials* 1521-1523, point 2: 'while recognition of a state by other states has only declarative value, such recognition, along with membership of international organizations, bears witness to these states' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law'.

state at the time of the Chinese occupation of 1950.²⁶ Thus other states do not recognise Tibet as a state and, in international law, itself largely a construct of and dominated by Western states who engage in and are in turn in thrall to the *realpolitik* of international relations, Tibet has fallen outside the scheme of things.²⁷ As a result China has been able to maintain its occupation and assert that Tibet was historically part of its territory, relying on other states not to interfere in its domestic affairs on a basis of territorial integrity.²⁸ This is buttressed by the political power of the People's Republic of China, a dominant force and Permanent Member of the United Nations Security Council. Thus, for example, the United States recognises the Tibet Autonomous Region (TAR) as an integral part of the People's Republic.²⁹

The issue of sovereignty is at the heart of the Tibet Question, but the primacy of the concept of sovereignty is itself under pressure. Neil Walker refers to a 'new multi-dimensional configuration . . . in which state and non-state polities relate';³⁰ in effect a constitutional pluralism, 'multiple levels of constitutional discourse and authority'.³¹ Walker argues that sovereignty is a centralised and orderly framework through which other 'values and virtues may flourish'.³² Thus, while sovereignty may be subject to various pressures, it remains a core concept that cannot be sidelined, to the extent that 'the entire U.N. conceptual structure is predicated on the recognition and legitimation

²⁶ Tibetan sovereignty *de jure* has not been recognised: see sections 3.2.1 and 3.4.2.

²⁷ See section 4.2.3 regarding international law as a Western construct. See also Dibyesh Anand, 'The Tibet Question and the West: Issues of Sovereignty, Identity, and Representation' in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 285-304, 285-288.

²⁸ See, for example, Article 2(4) of the Charter of the United Nations, with reference to the territorial integrity and political independence of states.

²⁹ CRS, 'China-U.S. Relations: Current Issues and Implications for U.S. Policy', Report for Congress, Congressional Research Service, The Library of Congress, updated 20 January 2006, <<http://fpc.state.gov/documents/organization/61492.pdf>>, accessed 14 September 2007, p. 21; see also Sloane RD, 'The Changing Face of Recognition in International Law: A Case Study of Tibet' (2002) 16 *Emory International Law Review* 107-186, 107.

³⁰ Walker N, 'Late Sovereignty in the European Union' in N Walker (ed.) *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 3-32, 5.

³¹ Ibid 4.

³² Ibid 31.

of the sovereignty of individual states'.³³ The pressures, though, come from a variety of sources: for instance, an expanding principle of self-determination which, since its inception, has undergone profound changes, the evolution of human rights covenants and conventions, a combination of sub-state nationalism and supranationalism, and potentially from the communicative power of the Internet. The Government of the People's Republic sees the latter as a threat, and the state seeks to exert control over the content of the Web available to its citizens.³⁴ The threat to sovereignty from a rising tide of sub-state nationalism and supranationalism is evident in Europe in the guise of the European Union and developments towards subsidiarity. It takes form as a potential alternative concept to sovereignty, a contrasting principle,³⁵ but as yet is in its infancy and restricted to a European dimension. There is, nevertheless, a weakening of exclusive territoriality.³⁶

All these pressures provide checks and controls to external sovereignty. Human rights were considered in some detail in Chapter 5 above, where the focus was placed on abuses of the human rights of Tibetans. These abuses, from a practical point of view, have had little impact in the wider world, despite UN resolutions referring to the fundamental rights of the Tibetan people.³⁷ The human rights factor does though supply a platform for debate: 'the expanding human rights agenda, with its growing visibility at the global level, has opened up the social and political space that enables

³³ Hardt M and Negri A, *Empire* (Cambridge, MA: Harvard University Press, 2001) 4-5.

³⁴ See section 4.3 above.

³⁵ See Carozza, note 76, Chapter 4 above.

³⁶ This in turn may lead to a new order having the potential to transcend sovereignty. For the weakening of the sovereign state in the EU, see MacCormick N, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), especially Chapter 8.

³⁷ United Nations General Assembly Resolutions 1353 (XIV) in 1959, 1723 (XVI) in 1961 and 2079 (XX) in 1965. Also see Resolution 1991/L.19 of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and, generally, section 3.4.3 above.

people to challenge the domestic status quo and to challenge the state'.³⁸ The idea of human rights thus gives Tibetans a public presence and leverage within international debate, yet in and of itself it has the potential to cloud the Tibetan debate,³⁹ particularly the potential to antagonise representatives of the People's Republic.

As to the doctrine of self-determination, to date it has proved a false friend to Tibet.⁴⁰ Nevertheless, the incorporation of principles of external self-determination into international law has had the effect of impinging on the law relating to sovereignty, contesting with that norm and effectively state building from the outside.⁴¹ In Chapter 2 the developments of the doctrine during the twentieth century were traced, from the effect of the theory at the time of the Peace Settlement in Europe following the First World War, through its application to peoples in the colonial context subsequent to the Second World War, to its interpretation in the Post-Cold War era; developments marked by momentum from a series of major events rather than a smooth progress. Its acceptance as a legal principle was entrenched, a principle of *erga omnes* character and arguably forming part of the body of *jus cogens*, with both legal and political implications. Issues inherent in the theory were examined, and the theory was analysed. Following an appraisal of Tibet's status and its changing identity in Chapter 3, and chapters specifically dedicated to sovereignty and human rights, Chapter 6

³⁸ Mountcastle A, 'The Question of Tibet and the Politics of the "Real"' in B Sautman and JT Dreyer (eds), *Contemporary Tibet: Politics, Development, and Society in a Disputed Region* (Armonk, New York: ME Sharpe, 2006) 85-106, 93. See also in this context notes 16-18, Chapter 2 above and related text, together with reference to points of entry for non-state actors to argue their case for self-determination.

³⁹ Mountcastle, *ibid*, 92 and 87.

⁴⁰ Richard Falk refers to Tibet having experienced 'the demoralizing burdens of thwarted self-determination and the criminal cruelties of persisting Chinese occupation', in contrast to Yugoslavia, 'experiencing the full nihilistic brunt of self-determination', both instances comprising 'opposed tragedies': Falk R, *On Humane Governance: Toward a New Global Politics* (Cambridge: Polity Press, 1995) 30.

⁴¹ See section 2.4.1 above with reference to self-determination as a principle of international law; also note 45 below and related text regarding state building from the outside.

analysed the principle of self-determination as it has evolved in the twenty-first century.

The two aspects to self-determination, external and internal, were examined in the context of Tibet. Internal self-determination in the form of autonomy is less threatening to the integrity of the state than is external self-determination, with its deducible extreme of secession from an existing state. However, a distinction is evident between the regional autonomy deriving from Marxist principles that the TAR enjoys and liberal principles of autonomy on which the Dalai Lama bases his proposal for genuine autonomy.⁴² The distinction also highlights the fact that in debating the Tibet Question two different Tibets emerge: the TAR, viz political Tibet, and ethnographic Tibet – which includes Tibetan provinces of Kham and Amdo, now incorporated within Qinghai, Gansu, Sichuan and Yunnan. The TAR has been treated differently by the People's Republic of China: the 1951 Agreement on Measures for the Peaceful Liberation of Tibet, for instance, related specifically to political rather than ethnographic Tibet, and it is political Tibet that has the status of an autonomous region. While prior to 1950 there is a strong argument that the Dalai Lama's writ ran in political Tibet, it is less clear that Tibetan government, or indeed any government, held sway and dominated in that part of Tibet that may be termed Inner Tibet.⁴³

While the Dalai Lama has moved towards a position seeking enhanced autonomy, not only for the TAR but also for the remainder of ethnographic Tibet, such moves have so far failed to produce a result. Indeed, the People's Republic has shown extreme reluctance to engage in any negotiation on the Tibet Question, and will not negotiate unless and until the Dalai Lama publicly makes a commitment that Tibet is an

⁴² See section 6.4.2 above.

⁴³ See section 4.4.2.3 above.

inalienable part of China. The Tibet Question has not been resolved through autonomy, and thus the question of sovereignty and therefore external self-determination returns to the fore. Secession has been analysed in Chapter 6, as it is in opposition to concepts of territorial integrity and sovereignty. As a result of the apparent inviolability of such concepts it may be seen that, subject to exceptions, unilateral secession is not recognised in international law.⁴⁴ However, recent developments in the Kosovan context indicate a momentum to the contrary, a momentum that has the potential to establish an exception to the bar prohibiting unilateral secession, and new support for secessionist entities, in short a new dimension to the right of self-determination.

The exception of supervised statehood has itself to reach fruition in Kosovo, yet it is the fact that Martti Ahtisaari, UN mediator in Kosovo, has felt able to make the proposal in compliance with the norms of international law that is important and demonstrates the evolving boundaries of the legal theory of self-determination and also the dynamism and momentum of the theory. It represents state building from the outside,⁴⁵ and consequently an attack on the supposed illegality of unilateral secession and on concepts of sovereignty and territorial integrity even though it is stated that the settlement should not create a precedent in relation to other unresolved conflicts.⁴⁶ It also represents an opportunity for Tibetans to ensure that the international community becomes fully seised of the Tibet Question. Just as the People's Republic of China has taken advantage of the Western doctrine of sovereignty, potentially the way is now open for Tibet to take advantage of self-determination through a legitimated claim for

⁴⁴ Certainly outside the context of self-determination: Abi-Saab G, 'Conclusion' in MG Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 470-476, 474.

⁴⁵ See Chapter 6, note 98 above and related text; also section 6.5 above.

⁴⁶ Paragraph 15 of the Report: see note 5 above and related text.

supervised statehood.⁴⁷ ‘The right of self-determination is indivisible’,⁴⁸ and thus, if the Kosovan example is applicable to Tibet, then Tibet should find support in the international community for a claim to similar independence. It is also of relevance that ‘Laws not only represent reality, but also create it’.⁴⁹ For instance, law has the potential to create the reality of an independent Kosovo.

A weakening of the norm of non-intervention in the internal affairs of states is apparent and the autonomous region of Tibet should be positioned prospectively to benefit from the proposal of supervised statehood for the autonomous province of Kosovo, which has been administered by the United Nations since Resolution 1244 (1999).⁵⁰ There are further factors though which are relevant. First, the potential importance of the remedial right theory promulgated in respect of self-determination should not be overlooked, particularly in conjunction with the advent of the apparent exception to the bar against unilateral secession. The Contact Group, in its ten Guiding Principles, emphasised the importance of human rights.⁵¹ Chapter 5 of the thesis has demonstrated an ongoing pattern of human rights abuse in Tibet, and that abuse founds a basis on which Tibetans can argue for self-determination – the self-determination to take the form of supervised statehood.⁵² It will be for Tibetans to

⁴⁷ The lack of clear-cut boundaries to the principle of self-determination and the fact that Tibet has not been seen as a right-holder have been referred to at section 2.2 above. Kosovo, too, as a province rather than a republic, has not previously been seen as a right-holder. The PRC rigidly interprets the doctrine of sovereignty, emphasising territorial integrity and non-interference in the domestic affairs of a state, which are perceived as purely internal matters for the state: see section 4.2.3 above.

⁴⁸ Seidel G, ‘A New Dimension of the Right of Self-Determination in Kosovo?’ in C Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer Law International, 2002) 203-215, 213.

⁴⁹ Twining W, *Globalisation and Legal Theory* (London: Butterworths, 2000) 238.

⁵⁰ Background on the Origins of UNOSCEK, note 75, Chapter 6 above.

⁵¹ See notes 76 and 78, Chapter 6 above and related text.

⁵² It equally founds a basis for Tibetans to argue a case for meaningful autonomy based on the remedial right theory: section 3.5.3 above.

show a systematic discrimination and grave violations of human rights, thus bringing about equivalence of their situation with that of the Kosovars.⁵³

A second pertinent factor relates to the people entitled to self-determination. Generally, resolution of the issue of 'peoples' entitled to the benefit of the principle of self-determination is in a state of flux, the nature of 'peoples' being undefined.⁵⁴ Like the Kosovars, Tibetans are 'a group of people living in a cohesive territory and they are closely connected by a common history, language, religion, culture and mentality. These are characteristics that distinguish one people from another.'⁵⁵ As a result, as a people, Tibetans have the right to self-determination, certainly so far as internal self-determination is concerned. However, if the analogy with Kosovo is to be taken up by Tibet and secession pursued, it is the autonomous unit that is of clear relevance, and thus the claim for supervised statehood should reside in the TAR rather than in ethnographic Tibet. The Kosovan example consequently gives the focus and definition to 'peoples' that is required in the Tibetan context.⁵⁶

A third factor of significance is that unilateral secession where it has arguably succeeded may be seen to be largely a product of violent revolution – Bangladesh, Kosovo – and such violence, and also terrorism, play a part in a changing world order.

Consequently, if all political weapons, including those relating to revolution, are to be

⁵³ Seidel, note 48 above, 209; also 210: 'The right of an oppressed people or minority to demand secession . . . is the sanction against a State's policy of ignorance and permanent and serious violations of human rights imposed on [a] people or minority.'

⁵⁴ See section 2.3.1 above.

⁵⁵ Seidel, note 48 above, 205.

⁵⁶ The status of the right to self-determination is dependent upon the recognition of the collective in question, and the recognition given to an expanded definition of 'peoples' to include the Kosovar Albanians should help to confer similar status on Tibetans. This focus given by the Kosovo example, though, entails Tibetans limiting in this respect what they have sought to date, and in a claim for supervised statehood excluding areas falling outside the TAR. The collective in question having the right to self-determination through supervised statehood would be the population in the autonomous region: see section 4.4.2.1 above regarding the population of the TAR. See section 2.3.1 above generally regarding 'peoples'. This is a problem Tibetans need to concentrate on as much support for the independence movement comes from Khampas and Amdowas, who regard themselves as Tibetans and committed to the independence struggle: see section 4.4.2.3 above.

available to Tibetans, it is necessary to decouple politics from religion,⁵⁷ while at the same time it is important not to distance religion too far from politics in the Tibetan context, because such support as Tibet has found over recent decades is based largely on support for the person of the Dalai Lama and for the Buddhist religion. Yet in Buddhism violence is antithetical, and if Tibetans are to pursue a claim for external self-determination then civil disobedience in the form of violent resistance may even now prove to be an essential precursor; state opposition to the concept of supervised statehood as expounded by Martti Ahtisaari is only to be expected, both in respect of Kosovo and otherwise when propounded.⁵⁸

Nevertheless there are compelling reasons why the People's Republic of China should consider a political solution to the Tibet Question and a reappraisal of the Sino-Tibetan relationship. First, there are external pressures in respect of human rights, and the People's Republic produces White Papers defending the state's position to the outside world – therefore the state is conscious of the potential impact of expanding human rights covenants, conventions, laws and custom; secondly, political realities regarding easing/improving relations with Taiwan, and whether Taiwan may be persuaded to return to the motherland; thirdly, increasing democratisation in China (and globally); fourthly, the advantages to the People's Republic, economically and politically, in full participation in the international community, and in particular in an improved and constructive relationship with America; and fifthly, the peaceful resolution of the Tibet Question, a resolution that may not only pay political dividends

⁵⁷ See Ardley J, *The Tibetan Independence Movement: Political, religious and Gandhian perspectives* (London and New York: RoutledgeCurzon, 2002) 178-181. Gerd Seidel argues in the circumstances of Kosovo, in the context of the maintenance of international peace, that 'Only a change in the *status quo* – the secession of Kosovo desired by the Kosovo Albanians – could ensure peace': Seidel, note 48 above, 213.

⁵⁸ Parent state opposition to such self-determination is inevitable, and has been evidenced in respect of the separation of Bangladesh from Pakistan and East Timor from Indonesia. The role of violence in independence movements generally, and the attendant implications for international law, is an interesting and increasingly important topic, but beyond the scope of this thesis.

but also achieve security of the state and provide economic dividends,⁵⁹ combining with the fact that violent repression of a Tibetan revolution, realistically an alternative to a peaceful resolution, is likely to lead to the People's Republic becoming a pariah of the international community.⁶⁰

In this sense, *realpolitik* has obvious relevance, impacting on legal doctrines in the context of a Kosovan solution for Tibet based on supervised statehood and providing a window of opportunity for a peaceful resolution of the Tibet Question. Equally it impacts from the Tibetan perspective, for no state to date has supported or recognised Tibetan independence. As the present Dalai Lama has entered his eighth decade, an urgency to resolve the Tibet Question is required, and thus it is now for further research to ensure that new impetus is given to the resolution of the Tibet Question by a refocus of the question into the ongoing discourse on self-determination, to take advantage of its widening momentum into the concept of supervised statehood broadened within the remedial right theory.⁶¹ Such a refocus will provide an opportunity for the doctrine of self-determination to stem the physical movement of peoples from Tibet,⁶² and also to establish finally the political and legal identity of Tibetans. It will create pressure on the international community to achieve a consistency in its approach to the principle of self-determination, and to achieve this before the Tibetans resort to violence.

⁵⁹ Economic dividends may be obtained as a result of reduction in the subsidies paid in regard to the TAR: see note 160, Chapter 5 above and section 6.4.1 above.

⁶⁰ Violent repression is more likely subsequent to the death of the present Dalai Lama, who exerts a moderating influence and whose 'stated goal of autonomy does not seem to correspond with the wishes of the majority of the Tibetan people': Ardley, note 57 above, 180. With regard to the issue of revolution, see note 53, Chapter 6 above.

⁶¹ It is in this concept of supervised statehood that an interstice opens up in the norm of sovereignty, which allows additional space for wider interpretation of self-determination.

⁶² Economist, 'Hu's afraid of the Dalai Lama' (2006)

<http://www.economist.com/opinion/displaystory.cfm?story_id=8172922>, accessed 14 September 2007: 'Disaffection with Chinese rule remains widespread. Up to 3,000 Tibetans still sneak across the border to Nepal and India every year.'

7.4 Implications for Public International Law

While the primacy of sovereignty and territorial integrity has been recognised in this thesis, it has also been shown that sovereignty is coming under increasing attack as other norms having the status, too, of *jus cogens* compete. Evidence of this has been elaborated in the particular instance of Kosovo.

There is as yet no final outcome so far as Kosovo is concerned, but the implications to date for international law and the international community are stark. The dynamism of the theory of self-determination has become clear over the last century as it has evolved as a legal principle and into its present form in the post-Cold War era. The concept of supervised statehood for Kosovo is a new departure, emphasising self-determination and human rights of a people in an autonomous region to the detriment of the sovereignty and territorial integrity of an existing nation state that has infringed principles of human rights and self-determination,⁶³ and if pursued supplies a new exception to the norm of sovereignty. While this in itself can reaffirm the existing norm of sovereignty, it also potentially opens the door for peoples seeking external self-determination as a new trend develops. Further, it instances a situation whereby states as the principal actors on the international stage are under pressure. For China, international law is seen as an instrument of a state's foreign policy, and in consequence it is only states that participate in international law and have legal personality.⁶⁴ However, if Martti Ahtisaari's proposals, under the auspices of the United Nations, come to fruition, the outcome will be a new state, having seceded against the will of its parent state, participating in international law. The Kosovo Status Settlement is particularly significant because Kosovo has had the status of an

⁶³ In this regard, see Seidel 210 at note 53 above.

⁶⁴ See section 4.2.3 above.

autonomous unit within a state. It was not and had not been a state, nor even a republic.⁶⁵

The new dimension opening up within international law as a result of the Kosovo proposals, which according to the Guiding Principles issued by the Contact Group should be fully compatible with international law,⁶⁶ is congruent with the International Court of Justice's interpretation of self-determination in cases such as *East Timor (Portugal v Australia)*,⁶⁷ which brought about a space for minorities to argue a case for self-determination.⁶⁸ Further, beyond the instance of Kosovo in regard to self-determination, there is increasing intervention by the international community in the affairs of sovereign states.⁶⁹ Thus there is a growing force in opposition to norms of sovereignty and territorial integrity, and the shape of international law changes, as the concept of exclusive territoriality weakens.⁷⁰ An increasing globalisation, an intensification of ever more complex worldwide social relations, disputes the primacy of norms of sovereignty and territorial integrity and

⁶⁵ See section 6.3.3 above. Hence the Status Settlement represents state building from the outside: see section 7.3 above.

⁶⁶ See sections 6.3.3 and 7.2 above.

⁶⁷ ICJ Reports 1995, 90.

⁶⁸ See section 2.2 above.

⁶⁹ Instances are numerous. For example, in Iraq, in respect of 'the intervention and overthrow of its government in 2003' (Crawford, note 23 above, 74), the legality of which intervention has been the subject of considerable and fractious debate, and by virtue of which 'some of the most fundamental rules and principles of international law are now in a state of flux': Lowe V, 'The Iraq Crisis: What Now?' (2003) 52 *International and Comparative Law Quarterly* 859-871, 859. In Sudan, the international community supplies financial, logistical and political support to African Mission in the Sudan Peacekeepers, but the UN has shown a reluctance to intervene directly 'in a situation in which there has been no semblance of consent among the parties to begin serious negotiations or to accept the presence of "peacekeepers"': Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition (Philadelphia: University of Pennsylvania Press, 1996) 493. In Somalia, in contrast, action has been taken by individual states who see such action as being in their national interest, rather than by the UN; Ethiopian forces have intervened, as have the USA: for example, Crilly R, 'Analysis: a military victory but Somalia vacuum looms' (2006) <<http://www.timesonline.co.uk/tol/news/world/article1264689.ece>>, accessed 14 September 2007; Clayton J, 'US strikes at al-Qaeda in Somalia' (2007) <<http://www.timesonline.co.uk/tol/news/world/article1290852.ece>>, accessed 14 September 2007.

⁷⁰ See, for example, MacCormick note 36 above and Walker, note 30 above, together with related text. Conversely, the principle of self-determination, which itself has limitations, as shown by its inability as yet to assist Tibet, strengthens and broadens.

thus the consolidation of states at the expense of empire emanating from the Peace of Westphalia.⁷¹

A reconfiguration of international law emerges under various pressures. First, from an expanding doctrine of human rights, not only rights of individuals but also group rights, and the concept of supervised statehood imports an added dimension into international law.⁷² Secondly, from an extended list of participants in international law, noting the instance of Kosovo, the judgment in cases such as *East Timor (Portugal v Australia)*,⁷³ and work such as the Draft Declaration on the Rights of Indigenous Peoples, adopted in 1994, whereby indigenous peoples took part in the Working Group that formulated the draft.⁷⁴ The September 11 World Trade Center attack in New York in 2001 also demonstrates an instance of non-state actors shaking ‘the basic conceptual framework of international law as a primarily inter-State matter’.⁷⁵

A third pressure comprises the increasing reach of actors in an increasingly integrated world, impacting on norms of international law as those actors, state or non-state, show themselves prepared to intervene in the affairs of third party states, in the form, for example, of the use of force and military occupation.⁷⁶ In this respect also, supranational organisations impinge on the established power of states, organisations

⁷¹ See note 23 above and related text; Michael Ignatieff refers to ‘a new exercise of imperial rule’: Ignatieff M, *Empire Lite: Nation-building in Bosnia, Kosovo and Afghanistan* (London: Vintage, 2003) 109.

⁷² See, for example, section 6.5 above; also Douzinas C, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000) 374.

⁷³ Note 67 above.

⁷⁴ (1995) 34 *International Legal Materials* 546; see section 2.4.2.4 above.

⁷⁵ Lowe, note 69 above, 859.

⁷⁶ Ibid. Bill Bowring refers to the ‘degradation’ of international law following the response of both the USA and the UK to 9/11, whereby certain states do not accept that international law is a legitimate curb on the use of force: Bowring B, ‘The degradation of international law’ in J Strawson (ed.), *Law after Ground Zero* (London: Glasshouse Press, 2002) 3-19, 3; also at 15: ‘The Security Council, and, in effect, the whole of the [UN] Charter and customary law on the use of force and self-defence, have been jettisoned in the name of the war against terrorism.’

such as the European Union and the World Trade Organisation. Non-governmental organisations are prevalent and the Internet has the power to exacerbate tensions.

The new dimension to the international order prospectively emanating from the Kosovo proposals, the capacity for re-mapping and reconfiguration of norms of international law resulting, have the potential for violence and fragmentation of states, and it is this potential that will now exercise the international community. Public international law needs to adapt to a changing world order in which existing norms are threatened by the effects of globalisation and the emergent norms of human rights, including the evolving principle of self-determination, a utilisation of the remedial right theory and a momentum from the Kosovo Status Settlement that has the potential to bring about a further exception to the restrictions on unilateral secession. It has been made clear in this thesis that unilateral secession is not recognised at international law, and that state practice has resisted any claim thereto.⁷⁷ Modern history reveals that, for a people to have the prospect of unilateral secession, violent civil disobedience is a genuine and credible strategy. This is the evidence of Bangladesh and also apparently of Kosovo. The concept of the state as the principal actor indeed dictates this, and thus it seems that where a state is unilaterally to separate along national or ethnic lines, outside the context of decolonisation, violence is generally a prerequisite.⁷⁸ This reflects the ‘philosophy of violence’ referred to by

⁷⁷ Section 6.3.1 above.

⁷⁸ An example of a mutual rather than a unilateral separation is the Velvet Divorce of the Czech and Slovak Republics on 1 January 1993, which did not entail violent rebellion: see section 2.4.2.2 above. Violence is not a route that necessarily leads to secession, although it has been the precursor to secession in Bangladesh, and will have been the precursor to secession in Kosovo if ultimately secession there is the end result: as to Bangladesh, see, for example, Choudhury GW, *The Last Days of United Pakistan* (London: C Hurst & Co, 1974) 186-187; also Bose S, ‘Anatomy of Violence: Analysis of Civil War in East Pakistan in 1971’ (2005) 40(41) *Economic and Political Weekly* 4463-4471, 4464-4467; and Crawford, note 23 above, 141. Chechnya, however, is no nearer to self-determination as a result of violence against the Russian state, and violence can be equated with terrorism against which nation states are united, particularly in the aftermath of the events of 9/11. Yet, even in recent years, terrorist violence can be construed as successful, and gains by organisations such as the Republicans in

Alain Finkelkraut.⁷⁹ Indeed, the failure of Tibet to achieve its independence from China, its self-determination, is itself an indication that violence is a necessary precursor to unilateral self-determination.

Fragmentation of states, an ever-increasing number of states, is the ultimate result of an expanding doctrine of self-determination, potentially leading to a greater fluidity of legal and political identity and increased movement of peoples; all these points evidenced by the break-up of the former Yugoslavia into its constituent parts. A greater tolerance within states coupled with the granting of greater autonomy to regions has the power to counteract the break-up of states, yet ultimately secession may be justified within the remedial right theory of self-determination.

A particular problem for the international community is that international law is interpreted in a broad fashion at the whim of powerful states, as evidenced for example in the divergent attitudes of states regarding both Iraq and also situations pertaining on the African continent.⁸⁰ It is in this notion of *realpolitik* exercised by the powerful that the kernel of one problem for Tibet lies, and indeed a problem is presented for the international community to solve.⁸¹ Tibet needs to establish, in the

Northern Ireland and the Basque Separatists in Spain have been achieved through, or despite, terrorist action. See also note 58 above re violence in independence movements.

⁷⁹ Finkelkraut A, *In the Name of Humanity: Reflections on the Twentieth Century* (London: Pimlico, 2001) 24. Such philosophy was endemic in the 20th century and is subject to criticism by Finkelkraut, who refers to the turnaround of philosophical tradition in a chapter entitled 'The Irony of History', whereby 'Evil is now good and violence useful': *ibid* 63. There is no sign of an end to this philosophy, and John Gray concludes his thought-provoking *Black Mass* with the words, 'the violence of faith looks set to shape the coming century': Gray J, *Black Mass: Apocalyptic Religion and the Death of Utopia* (London: Allen Lane, 2007) 210.

⁸⁰ See note 69 above. International law, and the international political system generally, protect incumbent states, but at the whim of dominant powers: compare the situations that have pertained in Iraq, Sudan and Somalia, and also note the failure of the Kurds as well as the Tibetans and Chechens to establish their own state. It is noteworthy that states 'rank what they take to be their vital interests over more universal considerations': Gray, note 79 above, 197.

⁸¹ The divergent attitudes of major powers to Tibet and to Outer Mongolia, which achieved independence recognised by China in 1946, is evidence of the part played by *realpolitik* in self-determination. See note 93, Chapter 4 above, and reference to the argument that at the start of the 20th century the status of Outer Mongolia and Tibet with respect to China was similar. Power as a key concept in political realist theory has been referred to in section 1.3.1 above; see also the five

first place, entitlement to the same form of supervised statehood as proposed for Kosovo, utilising in this instance the remedial right theory. Having done so, however, Tibetans need to then consider the impact of a resort to violent civil disobedience, and in this regard I have emphasised the necessity of Tibetans divorcing politics from religion, while at the same time not alienating their present supporters in so doing.⁸² Principally, though, Tibet needs to persuade powerful allies to take its side, and the most powerful of these is the United States. It was unable to do so in the 1950s and, in consideration of this particular problem, it must be borne in mind that America will not perceive it to be in its interest to risk direct military confrontation with the People's Republic of China.⁸³ In turn, however, the international community needs to find a route whereby entities such as Kosovo and Tibet can achieve self-determination without first having to resort to violence.

The Kosovo Status Settlement and the reaction to it of the international community are important for the future of international law. The failure to date of the international community and public international law to resolve the issues surrounding Tibet, combined with the failure to resolve other self-determination issues such as Kosovo and Bangladesh, also East Timor and Chechnya, peacefully and without recourse to violence, leads to the conclusion that the time is ripe for a new accommodation between the *jus cogens* norms of sovereignty and self-determination, at a time when violence and international terrorism are increasingly central to the thoughts of the international community. A remodelling is necessary to minimise friction between states and other actors, to avoid a perceived necessity of

propositions of realism referred to in Grieco JM, 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism' in DA Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993) 116-140, 118-119.

⁸² Sections 6.4.2 and 7.3 above; Chapter 6, note 70 and related text also.

⁸³ See Chapter 3, note 120 above.

recourse to violence and the potentially destructive forces of self-determination, and to achieve resolution to long-standing areas of discord within the international community such as Kosovo and Tibet. For Tibet, the moment has come to refocus its claims with reference to self-determination and take advantage of a reconfiguration of international law potentially brought about through the machinations of the Kosovo Status Settlement.

Appendix of Primary Sources

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1648	Peace of Westphalia
1842	Letters of Agreement between Tibet and Ladakh
1856	Treaty between Nepal and Tibet
1904	Convention between Great Britain and Tibet
1912	Urga Treaty
1914	Simla Convention
1922	Treaty of Versailles/Covenant of the League of Nations
1929	Lateran Treaty
1933	Montevideo Convention on Rights and Duties of States
1945	Charter of the United Nations
1948	Universal Declaration of Human Rights
1949	Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War
1954	Sino-Indian Trade Agreement over Tibetan Border

1955	Warsaw Treaty of Friendship, Cooperation and Mutual Assistance
1956	Agreement on Economic Aid between China and Nepal
1963	Charter of the Organization of African Unity
1966	International Convention on the Elimination of All Forms of Racial Discrimination
1966	International Covenant on Civil and Political Rights
1966	International Covenant on Economic, Social and Cultural Rights
1969	Vienna Convention on the Law of Treaties
1977	Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
1979	Convention on the Elimination of All Forms of Discrimination against Women
1981	African Charter on Human and People's Rights
1984	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
1989	Convention on the Rights of the Child
1993	Vienna Declaration and Programme of Action on Human Rights
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